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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

~~No. 251.~~ 66

JOHN H. HERNDON, APPELLANT,

vs.

VOLNEY E. HOWARD, RICHARD A. HOWARD, RUSSELL HOWARD, THOMAS H. BENNETT, CAROLINE H. BENNETT, E. H. LOMBARD, JULIA A. LOMBARD, AND MEHITABEL HOWARD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 10, 1869.

SUPREME COURT OF THE UNITED STATES.

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JOHN H. HERNDON, APPELLANT,

vs.

VOLNEY E. HOWARD, RICHARD A. HOWARD, RUSSELL HOWARD, THOMAS H. BENNETT, CAROLINE H. BENNETT, E. H. LOMBARD, JULIA A. LOMBARD, AND MEHITABEL HOWARD.

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1 In circuit court of the United States for the western district of Texas, at Austin sitting.—January term, A. D. 1867.

Be it remembered that, on the 17th day of February, A. D. 1851, at Galveston, in the then district of Texas, in the district court of the United States holding sessions at said city of Galveston, the said court then holding and exercising circuit court powers, came Bainbridge D. Howard, by his solicitors, Hughes & Howard, and filed in said court in chancery their bill of complaint; which bill is endorsed as follows, to wit:

C. 64. U. S. district court. In chancery. District of Texas. April term, 1851. B. D. Howard vs. Archibald Hodge et als. Original bill Filed February 17th, 1851, and process issued same day. James Love, clerk.

And which is in words to wit:

Petition.

To the Honorable John C. Watrous, judge of the district court of the United States for the district of Texas, in chancery sitting:

Bainbridge D. Howard, a citizen and resident of the city of New Orleans, and State of Louisiana, complainant, brings this his bill of complaint against Archibald Hodge, Miles M. Battel, George W.
2 Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith, citizens and residents of the State of Texas, and James A. Mason, a citizen of the State of Pennsylvania, defendants.

And thereupon your orator sets forth and complains that, on or about the 22d day of November, A. D. 1766, the government of Spain, according to the forms of law and by the regularly constituted officers of government, granted to the Indians of the population of the mission of San Jose a certain tract or parcel of land, situated, lying, and being in what is now the county of Medina, in the State of Texas, in the district of Texas aforesaid, being all that certain tract or parcel of land which is bounded as follows, to wit:

Beginning on the top of Padron Hill; thence, running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a landmark, near the road leading to the presidio of the Rio Grande; thence, along the road, westwardly to the arroyo or creek Palahuia, where there was placed a landmark; thence, turning towards the north, to the road that comes from the cañon to the Loma Alta, where was placed a landmark by piling stones a
3 short distance from the landmark of Baltazar Perez, an adjoining proprietor; thence, following an east course, to the said Patron Hill, the place of beginning; and your orator is informed and believes, and is advised and so charges, that, by the laws of said government of Spain, in force at the time of the making said grant and subsequently thereto, operating on the said grant, and the contract indicated thereby, an indefeasible estate in fee was vested in the said Indians of the population of the mission of San Jose aforesaid.

Your orator further represents unto your honor that, by regular and complete conveyances in fee from the said Indians then entitled, to those, or him under whom your orator claims, and to your orator, all the right, title, and interest of the said Indians in and to the said land de-

scribed as aforesaid was, according to the forms of law, duly vested in your orator, and thereby he became and was seized and possessed of the same in fee; all which will more fully and at large appear by the grant to said Indians and the chain of conveyances down to your orator, to which, for greater certainty, at the hearing, your orator begs leave to refer. And your orator is advised that said grants and convey-
4 ances vested in your orator the domion and absolute property in and to the said tract or parcel of land described as aforesaid; and that he or they under whom he claims, and those claiming under him, were and are in the actual occupation of the said tract or parcel of land; and he had well hoped that he, and those claiming under him, would have continued and remained in such occupation and possession undisturbed, without litigation, and without any cloud upon or impending over his title, and without the necessity of harrassing or vexatious litigation as to the same. But now so it is, may it please your honor, that the said Archibald Hodge, Miles Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and James A. Mason, combining and confederating to and with each other, and with others to your orator unknown, for the purpose of wronging and injuring your orator in the premises, have jointly or separately, in their own names, or in the names of others, made, and caused to be made, locations and surveys on large portions of the said tract or parcel of land, by virtue of certificates or warrants, or other rights to location, issued and acquired under
5 the laws of the republic of Texas; but whether they, or either of them, have obtained patents upon their said surveys your orator is not informed; and by virtue of said locations, surveys, and patents, if obtained, said parties pretend that they have obtained a right to so much of said tract or parcel of land as may be covered by said locations, surveys, and patents, if obtained; and by virtue of said pretended right, they, or some of them, have disturbed, and are disturbing, the seizin and possession of your orator so obtained as aforesaid, though they well know that said locations, surveys, and patents, if obtained, are void and of no effect; and the said locations, surveys, and patents, if obtained, form a cloud upon or impending over the title of your orator, which he is advised and believes cannot be removed and the title settled, and the possession of your orator to his tract or parcel of land aforesaid quieted at law, without a multiplicity of actions and harrassing and vexatious litigation, all which is contrary to equity and good conscience; and for and as much as your orator is remediless at and by the direct and strict rules of the common law, and relievable only in equity where matters of this and the like kind are only properly cognizable and relievable:
6 To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed; and may, upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

1. Have they, the said defendants, or either of them, or any other person or persons for them, or either of them, in their or either of their own names, or in the name or names of any other person or persons, and what person or persons, made, or caused to be made, any location or surveys by virtue of certificate or certificates, warrant or warrants, or by virtue of other rights to location and survey within [within] the

boundary of the tract or parcel of land aforesaid; and if yea, when were said locations and surveys, and each of them, made, and have patents issued on said locations and surveys; what was and is the amount or number of acres in each of said locations and surveys, or locations, its particular locality, and in whose name or names made?

7 2. Are the said locations and surveys, or either of them, in whole or in part, within the bounds of the tract or parcel of land aforesaid claimed by your orator; and, if not in the whole, how much and what part is without the same?

3. How much and what part of the said tract or parcel of land claimed by your orator as aforesaid is claimed by the said defendants, or either of them; and by what title and when accrued?

4. What other locations and surveys, and how many, and when, and to what amount for each, have been made by any; and what other person or persons within the limits or boundary of the tract or parcel of land claimed by your orator as aforesaid?

And that, by decree to be rendered herein by your honor, the locations and surveys and patents, if any, made within the limits of your orator's tract or parcel of land aforesaid, may be determined and held to be void, and thereby the cloud impending over the title of your orator be removed; or that after establishment of the right in such manner as this court may direct by final decree to be then rendered, your orator may be quieted in his title and possession aforesaid; and all obstruc-

8 tion to the full and peaceable enjoyment of his property removed; or, that if your orator is mistaken in the special relief hereby asked, such other or further relief be extended to him, or decree rendered in the premises, as the nature of the case may require; may it please your honor to grant unto your orator the United States writ of subpœna directed to the said Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, commanding them to be and appear in this honorable court in the time and manner prescribed by the rules of the court, then and there to answer this bill, and to do further and receive what your honor shall order or direct in the premises; and your orator, as in duty bound, will ever pray, &c.

ROBT. HUGHES,
V. E. HOWARD,
Solicitors for Complainant.

NOTE.—Each one of the defendants are required to answer all the interrogatories in this bill contained from No. 1 to 4, inclusive.

HUGHES & HOWARD,
For Complainant.

Two erasures and two interlineations on second page; one erasure and one interlineation on third page; and one erasure on each of [of] the fifth and sixth pages.

H. & H.

9 And afterwards, to wit, on the 17th day of March, A. D. 1851, a subpœna to J. H. Herndon was issued as follows, to wit:

Subpœna for J. H. Herndon.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honora-

ble the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hudson, Samuel Luckie, and Samuel S. Smith, by Bainbridge D. Howard; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of March, A. D. eighteen hundred and fifty-one, and seventy-fifth year of the independence of the United States of America.

10 [L. S.] JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of April next, otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received 17th March, 1851, and executed on the same day by serving the within-named defendant, J. H. Herndon, in the city of Galveston, with a true copy of this subpœna, and exhibiting to him the original.

J. BATES, *U. S. M.*,
By J. B. BATES, *Deputy Marshall.*

And afterwards, to wit, on the 17th day of February, A. D. 1851, a subpœna to J. H. Herndon was issued as follows, to wit:

Subpœna for Herndon.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden
11 in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75th year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday in April next, 1851, otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received February 17, 1851, and executed on the 24th day of March, 1851, by serving the within-named defendant, J. H. Herndon, with a true copy of this subpœna, and exhibiting to him the original.

12 J. BATES, *U. S. Marshal,*
By J. R. MILLER, *Deputy Marshall.*

Subpœna for A. Hodge.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Archibald Hodge, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and the seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75 year of the independence of the United States of America.

[L S.] , *Clerk.*

13 The defendant is required to enter his appearance in the above suit, in the clerk's office, on or before the first Monday of April next, 1851, otherwise the bill will be taken as confessed.

, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received February 17th, 1851, and executed on the 24th day of March, 1851, by serving the within-named defendant, Archibald Hodge, with a true copy of this subpœna, and exhibiting to him the original.

J. BATES, *U. S. Marshall.*
By JOHN R. MILLER, *Deputy Marshall.*

And on the 17th day of February, A. D. 1851, a subpœna for Willard Richardson was issued as follows:

Subpœna for W. Richardson.

UNITED STATES OF AMERICA, *District of Texas:*
The President of the United States of America to Willard Richardson, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited
against you, Archibald Hodge, Miles M. Battel, George W. Price,
14 R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, and Samuel S. Smith; and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75th year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

Defendant is required to enter his appearance in the above suit in the clerk's office, on or before the first Monday of April next, otherwise the bill will be taken for confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Received February 17th, 1851, and executed the 21st day of February, 1851, by serving the within-named defendant, Willard Richardson, with a true copy of this subpœna, and exhibiting to him this original.

J. BATES, *U. S. M.*,
By J. B. BATES, *Deputy Marshal.*

And on the 17th day of February, 1851, a subpœna was issued to Miles M. Battel as follows, to wit:

15 *Subpœna for M. M. Battel.*

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Miles M. Battel, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of April next, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel Luckie, Willard Richardson, Samuel S. Smith, Samuel A. Maverick, and James P. Hudson, and to do further

and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 17th day of February, A. D. eighteen hundred and fifty-one, and 75th year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

16 *Return.*

Received February 17th, 1851, and executed the 24th day of March, 1851, by serving the within-named defendant, Archibald Hodge, with a true copy of this subpœna, and exhibiting to him the original.

J. BATES, *U. S. Marshal,*
By JOHN R. MILLER, *Deputy Marshal.*

NOTE.—And it appears that certain subpœnas and alias subpœnas were issued during the months of February & October, A. D. 1851, the returns upon which show the respective persons to be "not found" or "dead," to the following persons, to wit: Samuel Luckie, James P. Hudson, George W. Price, Samuel A. Maverick, R. C. Garza, Samuel S. Smith; alias sub. James P. Hudson, R. C. Garza.

And on the 28th day of October, A. D. eighteen hundred and fifty-one, an alias subpœna was issued to Samuel A. Maverick, as follows, to wit:

Alias s'p'a for Maverick.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Samuel A. Maverick, greeting:

You are hereby commanded, as you have before been, to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district,
17 on the first Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, J. H. Herndon, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, James P. Hudson, Samuel Luckie, Willard Richardson, and Samuel S. Smith, by Bainbridge D. Howard, and to do further, and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and seventy-sixth year of the independence of the United States of America.

[L. S.] JAMES LOVE, *Clerk.*

The following return appears upon the original of the above alias subpœna, to wit:

Return.

Received October 28th, 1851, and executed on the 18th November, 1851, by giving the within-named defendant a copy of this subpœna.

J. BATES, *U. S. M.*

And on the 28th day of October, A. D. 1851, an alias subpœna was issued to Samuel S. Smith as follows, to wit:

Alias s'p'a for S. S. Smith.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Samuel S. Smith, greeting:

You are hereby commanded, as you have before been, to appear
18 personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, & Willard Richardson, by Bainbridge D. Howard, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and seventy-sixth year of the independence of the United States of America.

[L S.] JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office, on or before the first Monday of December next, otherwise the bill will be taken for confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above alias subpœna, viz:

19 *Return.*

Received Oct. 28th, 1851, and executed on the 24th day of November, A. D. 1851, by giving the within defendant a copy of this alias subpœna.

J. BATES, *U. S. M.*

Alias subpœna for S. Luckie.

UNITED STATES OF AMERICA, *District of Texas:*

The President of the United States of America to Samuel Luckie, greeting:

You are hereby commanded, as you have before been, to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Galveston, in and for said district, on the first

Monday of December, or whensoever the said court shall there be, to answer a bill exhibited against you, Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Willard Richardson, and Samuel S. Smith, by Bainbridge D. Howard, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness the Hon. John C. Watrous, judge of said court, and seal of court, at the city of Galveston, this 28th day of October, A. D. eighteen hundred and fifty-one, and seventy-sixth year of the independ-
20 ence of the United States of America.

JAMES LOVE, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office, on or before the first Monday of December next, otherwise the bill will be taken as confessed.

JAMES LOVE, *Clerk.*

The following return appears upon the original of the above alias subpœna, to wit:

Return.

Received Oct. 28th, 1851, and executed on the 24th day of November, A. D. 1851, by giving the within-named defendant a true copy of this alias subpœna.

J. BATES, *U. S. M.*

Thereupon appears the following agreement in the papers of the cause, made and executed at Galveston March 26th, 1855, and endorsed as follows, to wit:

C. 64. Benjamin D. Howard vs. Archibald Hodge et al. Agreement. Filed March 26th, 1855. James Love, clerk.

Which agreement is as follows, to wit:

Agreement.

District court U. States, dist. of Texas.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET ALS.

Two cases at law and in equity.

In these causes an order having passed the court that they be transfered to and entered on the docket of this court at the city of Austin,
21 to be there proceeded in, it is now agreed between the undersigned counsel for the plaintiff and defendants in the above causes that the papers and files of the said causes be conveyed to the city of Austin by Robert Hughes, esq'r., of counsel for the plaintiff, and delivered to the clerk of the district court there.

Galveston, March 26th, 1855.

ROBT. HUGHES,
G. W. PASCHAL,
Pp. L. A. THOMPSON.

And afterwards the following order appears upon the chancery minutes of the court, to wit:

Death of Howard suggested.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } Chancery.

Now on this day came complainants, by their solicitor, also the counsel for defendants, and the death of Bainbridge D. Howard being suggested, the court is moved that new parties be made to this cause, and there being no opposition leave is granted to the complainant to file his bill of revival.

And the following entry appears upon the rule book of this court, to wit:

Dismission at rules.

BAINBRIDGE D. HOWARD
vs.
ARCH. HODGE ET AL. } No. 10, in chancery.

The complainant having failed to revive this cause after suggestion of death, it is dismissed.

J. A. & GEO. W. PASCHAL,
Sol's pro Comp'ts.

22 MATTHEW HOPKINS, *Clerk.*

Filed rules Decem., 1858.

And afterwards the complainants, by their solicitor, filed the following motion, which appears upon the rule book of this court, to wit:

Motion to set aside dismission at rules.

Jan'y rules, Jan. 1st, 1859.—No. 64, in chancery in the United States district court for the western district of Texas, at Austin.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } Chancery.

In the above entitled and numbered cause, Volney E. Howard, a citizen of the State of California, residing at San Francisco, one of the heirs at law of Bainbridge D. Howard, deceased, the complainant therein in behalf of himself and the other heirs at law of said deceased, moves the court to set aside the order of dismissal entered at the last rule-day at the costs of the party who caused the same to be entered, and he asks leave to refer to the papers on file in said cause and the orders heretofore made therein, together with such affidavit or affidavits showing facts as he may file at or before the hearing of the motion in support thereof.

Jan. 1st, 1859.

VOLNEY E. HOWARD,
Per ALEXANDER, *his Solicitor.*

And the following affidavit appears in the papers of the cause, endorsed as follows, to wit:

Bainbridge D. Howard vs. Archibald Hodge et al. Filed
23 Jan'y 5th, 1859. Matthew Hopkins, clerk.

And in words to wit:

Affidavit.

In the U. S. dist. court at Austin—In ch'y.

B. D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 64.

This affiant, being duly sworn, makes oath and says that this affiant, Russell Howard, and Richard A. Howard, citizens of the State of Texas; Volney E. Howard, a citizen of the State of California; Mehitibel Howard, Thomas F. Bennet, and his wife Caroline H. Bennet; Ephraim H. Lambard, and his wife, Julia A. Lambard; the last five-named citizens of the State of Illinois, are the sole heirs of Bainbridge D. Howard, deceased, late a citizen of the State of Louisiana, and complainant in the above-entitled cause.

Affiant says that some time in November or December, A. D. 1851, said B. D. Howard died; that, being in delicate health, he started on a voyage to Naples, in the kingdom of Italy, and died at sea, on his outward voyage, and it was some considerable time before the news of his death, which came from Italy, reached the State of Texas.

Affiant further says that at the date of the death of said B. D. Howard, the said M. Howard, T. F. Bennett, & C. H. Bennet resided in the interior of the State of New York, near the Genesse Valley; that
24 E. H. Lambard & said Julia A. Lambard resided at Brandon, in the State of Mississippi; that said V. E. Howard removed to the State of California in the fall of the year A. D. 1853; that afterwards the said Lambards and said Bennets removed, respectively, from Mississippi and New York, to said State of Illinois.

Affiant further says that during the lifetime of said B. D. Howard, said suit was in the charge of said V. E. Howard, as attorney for the complainant, who had joined with him Judge Robt. Hughes, of Galveston, in the State of Texas; that about the month of Jan., A. D. 1855, this affiant went to Galveston and applied to said Robt. Hughes for the important proofs and documents of complainant in said cause, and had said cause removed to Austin. Said Hughes replied to affiant that he did not think he had them & did not know where they were.

Affiant further says that afterwards, to wit, on or about the day of July, A. D. 1857, the said Richard A. Howard wrote to said V. E. Howard, in California, in regard to said papers and proofs, and, asking where they were, said V. E. Howard replied that they were in the hands of said Hughes, or, if not, they might be among the papers of said B. D. Howard, in the city of New Orleans, State of Louisiana; and afterwards, to wit, about the month of December, A. D. 1857, the said R. A.
25 Howard went to said city & made search among the papers of said estate and failed to find said documents, after due diligence in said search. Affiant then, being convinced that said papers were in the hands of said Hughes, on or about the 20th day of November, A. D. 1858, started from Bexar County to Galveston, Texas, with the sole business

to procure said papers from said Hughes. Upon arriving near the coast affiant learned that said Hughes was about removing his office from Galveston to Goliad, Texas, and was not then in Galveston; affiant followed said Hughes to Refugio, Texas, where he overtook him, and again made application for the same to him, and said Hughes again repeated that he did not think he had them, but would make search when he returned to Goliad. Affiant waited until said Hughes returned there, when upon a search and examination in December, about the 5th or 6th, 1858, said Hughes found said papers and gave them to this affiant. The papers and documents alluded to in this affidavit are a certified translated copy of the original title to McMullen of the title to the land in controversy in this suit, the original transfer of the right claimed by B. D. Howard therein from said John McMullen to said B. D. Howard, and other valuable and important papers connected with said suit.

26 Affiant further says that as soon as practicable, and before the first day of the present term of said court, he brought said papers to Austin, Texas, and proceeded to prepare said cause for revival.

Affiant further says that after the return of said Richard A. Howard from New Orleans, and after said search, the said R. A. Howard, in January, A. D. 1858, again wrote to said V. E. Howard, and also to said Hughes, in relation to said business and papers, without being able to procure the same.

Affiant further says that said M. Howard is the mother of said B. D. Howard, and said Julia A. Lambard and Caroline H. Bennet are his sisters, and said V. E. Howard, R. A. Howard, and affiant are his brothers, and further that said B. D. Howard left no lineal descendants, or other heirs, than these, as he verily believes; that the aforesaid transfer from John McMullen to B. D. Howard is only an equitable title, and the same is not registered; and without said transfer the said heirs of B. D. Howard, could not successfully prosecute this suit, there being no other written evidence in existence of the rights of said deceased.

Affiant further says that he is informed that Rafael C. Garza, James P. Hudson, and Samuel Luckie, named as defendants in original bill, are dead; and affiant further says that said John McMullen is also dead.

And further affiant saith not.

27 RUSSELL HOWARD.

Sworn to and subscribed before me, Matthew Hopkins, clerk of the United States court for the western district of Texas, and ex officio U. S. commissioner.

MATTHEW HOPKINS, *Clerk, &c.*

And the following order appears upon the chancery minutes of this court, to wit:

Dismission at rules set aside.

BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL.

Now, on this day, came the solicitor for complainant and, upon his motion, it was ordered that the judgment of dismissal entered at rules by the solicitors of defendants be, and the same is hereby, set aside.

And afterwards, to wit, on the 29th day of January, A. D. 1859, complainant, by solicitor, filed a bill to revive, endorsed as follows, to wit:

Ch'y 64. No. 10. Chancery, Bainbridge D. Howard's heirs vs. bill to revive, &c. Hodge et al. Filed January 29th, 1859. M. Hopkins. Alexander, solicitor for complainants.

And in words as follows, to wit:

Bill of revivor.

To the Honorable Thomas H. Duval, judge of the district court of the United States for the western district of Texas, holden at Austin, in chancery sitting:

Humbly complaining, show unto your honor your orators,
28 Volney E. Howard, who is a citizen of the State of California; Richard A. Howard and Russell Howard, who are citizens of the State of Texas; Thomas H. Bennet and Caroline H. Bennet, (formerly Howard,) his wife; Ephraim H. Lambard, (formerly Howard,) his wife; and Mehitabel Howard, each of whom is a citizen of the State of Illinois; that the aforesaid Volney E., Richard A., and Russell, are the surviving sisters, and that said Mehitabel is the mother (she being a widow) of, Bainbridge D. Howard, deceased, and that they are the sole heirs at law of said deceased. And your orators farther show that said Bainbridge D. Howard, deceased, did, in his lifetime, to wit, on the seventeenth day of February, A. D. 1851, file his bill of complaint against Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, unto which bill your orators refer, adopting the allegations and prayer for relief thereof, and that said Bainbridge D. Howard died in the autumn of said A. D. 1851, at sea on a voyage from the United States of America to Italy, before said defendants had filed his answer unto said bill of complaint. And your orators farther show that since the death of said Bainbridge D. Howard, the following named of said defendants have
also departed this life, to wit, R. C. Garza, James P. Hudson,
29 and Samuel Luckie, and that, in consequence of the death of all of the aforesaid who are avered to be dead, the suit of said Bainbridge D. Howard, deceased, became and is abated. And your orators farther show unto your honor that one Antonio Sierra has married Maria Antonia Veramendi y Sierra, who was the widow of said R. C. Garza, deceased; and that said Maria, together with Juan Garza and Adolfo Garza, who are the infant sons of said R. C. and said Maria, are the sole heirs at law of said R. C. Garza, deceased, and that they are citizens of the State of Texas and reside in or near the county of Bexar therein; and that is the heir at law of said James P. Hudson, deceased, and is a citizen of said State of Texas, residing in County, therein; and that William F. Luckie, whose citizenship and residence are unknown unto your orators, is the surviving brother and is the heir at law of said Samuel Luckie, deceased. To the end, therefore, that said suit, and the proceedings therein, may stand revived and be in the same plight and condition that they were in at the time of the death of said Bainbridge D. Howard, and that your orators may have the benefit thereof, may it please your honor to grant the writ of subpœna to revive and answer, issuing out of and under the seal of this honorable court,
directed to the original surviving defendants to this suit and to
30 the aforesaid heirs at law of such of them as are dead, thereby commanding them, under a certain pain, therein to be limited, to appear and answer the premises, and to show cause, if any they can, why

said suit, and the proceedings therein, should not stand revived against them and be in the same plight and condition as they were at the time of the death of the said Bainbridge D. Howard, and further to abide such order and decree in the premises as your honor shall deem meet; and your orators shall ever pray.

ALEXANDER,
Solicitor for Complainants.

JANUARY 29TH, 1859.

And thereupon subpœnas were issued as follows, to wit:

Subpœna for S. S. Smith.

UNITED STATES OF AMERICA, *Western District of Texas:*

The President of the United States to Samuel S. Smith, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife, & Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitable Howard, the remaining brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, and James A. Mason, defendants, in original bill, (and R. C. Garza, James P. Hudson, and Samuel Luckie ,having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, widow of said R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of said R. C. Garza, dec'd and said Maria; and heir at law of James P. Hudson; and William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd, to shew cause, if any you have, why the cause shall not be revived, and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

31

Witness the Honorable Thomas H. Duvall, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken for confessed.

MATHEW HOPKINS, *Clerk.*

32 The following return appears upon the original of the foregoing subpœna, to wit:

Return.

Came to hand on the 7th day of May, A. D. 1859, and executed on

the 7th day of May, 1859, by serving Samuel S. Smith, within-named def't, in person, with a true copy hereof, in the county of Bexar, 80 miles from the city of Austin.

W. C. YOUNG,
U. S. Marshal W. D. Texas,
By SAMUEL NEWTON, *Deputy.*

Subpœna for W. E. Howth.

UNITED STATES OF AMERICA, *Western District of Texas:*
To the marshal of the eastern district of Texas—The President of the United States to W. E. Howth, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday next, or whensoever said court shall there be, to answer a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife, Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitable Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, being impleaded
33 with Archibald Hodge, Miles M. Battel, George W. Price, R. C. Garza, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, the widow of R. C. Garza, dec'd, and the said Maria; and , the heir at law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd; to show cause, if any you have, why the cause shall not be revived, and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday in July next, otherwise the bill will be taken as confessed.

MATHEW HOPKINS, *Clerk.*

34 The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed June 4th, 1859, in the county of Austin, by serving the defendant, W. E. Howth, a true c'y of this writ, as certified by the cl'k of the U. S. district court at Austin, Texas.

H. E. McCULLOCH, *U. S. Marshall,*
By JOHN P. FENELL, *Dep'ty.*

Subpœna for Herndon.

UNITED STATES OF AMERICA, *Western District of Texas:*

To the marshal of the eastern district of Texas—The President of the United States to J. H. Herndon, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife, Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitable Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battel, George W.
35 Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, widow of said R. C. Garza, dec'd, and Juan Garza and Adolph Garza, infant sons of R. C. Garza, dec'd, and said Maria; and , the heirs at law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause should not be revived, and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

MATHEW HOPKINS, *Clerk.*

36 The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed on the 14th day of the same month, at Galveston, by giving the defendant, J. H. Herndon, a true copy of this writ, as certified by the clerk of the district court of the United States for the western district of Texas, at Austin.

H. E. MCCULLOCH, *U. S. Marshall.*

Subpœna for W. Richardson.

UNITED STATES OF AMERICA, *Western District of Texas:*

To the marshall of the eastern district of Texas—The President of the United States to Willard Richardson, greeting:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and juris-

diction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife, and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitable Howard, the surviving brothers, sisters, and mother of Bainbridge D. Howard, deceased, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battell, George W.
37 Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Samuel S. Smith, and James A. Mason, defendants in original bill, (and R. O. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, the widow of R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of said R. C. Garza, dec'd, and said Maria; and , heir at law of said James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived, and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

MATHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

MATHEW HOPKINS, *Clerk.*

38 The following return appears upon the original of the above subpœna, to wit:

Return.

Received May 9th, 1859, and executed same day, by giving the defendant, Willard Richardson, a true copy of this writ, as certified by the clerk of the district court of the United States for the western district of Texas, at Austin.

H. E. McCULLOCH, *U. S. Marshall.*

Subpœna for heirs of R. C. Garza.

UNITED STATES OF AMERICA, *Western District of Texas:*

The President of the United States to Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, heirs of R. C. Garza, dec'd; Juan and Adolfo Garza, infant sons of said R. C. Garza, dec'd, and said Maria, widow of said R. C. Garza:

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever said court shall there be, to answer to a bill of re-

vivor of Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H. Bennett, (formerly Howard,) his wife, and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitabel Howard, the remaining brothers, sisters, and mother of Bainbridge D. Howard, dec'd, exhibited against you, you be-
39 ing impleaded with Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, Samuel A. Maverick, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, James A. Mason, Samuel S. Smith, defendants in original bill, (and the said R. C. Garza, James P. Hudson, and Samuel Luckie, having deceased,) with , heir at law of James P. Hudson, dec'd; and William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived, and to do further and receive what the said court shall have considered in that behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States of America.

[L. S.] MATHEW HOPKINS, *Clerk.*

The defendents are required to enter their appearance in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

MATHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Came to hand on the seventh day of May, A. D. 1859; exe-
40 cuted on the 15th day of May, 1859, by serving Maria, late widow of R. C. Garza, now wife of Antonio Sierra, within-named defendent, in person, at her house in Bexar County, with a true copy of this subpœna, and at the same time and place handed her true copies of the above subpœna for the within-named defendents, Antonio Sierra and Adolfus Garza, she being the wife of Antonio Sierra and mother of Adolfus Garza, now of full age, it being their home, requesting her to deliver the same to the proper persons, which she promised to do. May 28th, 1859, handed in person to the other named defendent, Juan Garza, a true copy of this subpœna in Bexar County.

WM. C. YOUNG,
U. States Marshal W. D. Texas,
By SAM'L NEWTON, *Deputy.*

Subpœna for Maverick.

UNITED STATES OF AMERICA, *Western District of Texas:*

The President of the United States to Samuel A. Maverick, *greeting:*

You are hereby commanded to appear personally before the honorable the United States district court, exercising the powers and jurisdiction of a circuit court of the United States, at a court to be holden in the city of Austin, in and for said district, on the first Monday of June next, or whensoever the said court shall there be, to answer to a bill of revivor of Volney E. Howard, Richard A. Howard, Russell Howard,

Thomas H. Bennett and Caroline H. Bennett, (formerly How-
41 ard,) his wife, and Ephraim H. Lombard and Julia A. Lombard, (formerly Howard,) his wife, and Mehitable Howard, surviving brothers, sisters, and mother of Bainbridge D. Howard, dec'd, exhibited against you, you being impleaded with Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, defendants in original bill, (and R. C. Garza, James P. Hudson, & Samuel Luckie, having deceased,) with Antonio Sierra, husband of Maria Antonia Veramendi y Sierra, the widow of R. C. Garza, dec'd, and Juan Garza and Adolfo Garza, infant sons of R. C. Garza, dec'd, and the said Maria; and , heir at law of James P. Hudson, dec'd; and William F. Luckie, surviving brother of Samuel Luckie, dec'd, to show cause, if any you have, why the cause shall not be revived; and to do further and receive what the said court shall have considered in this behalf. And this you shall not omit under the penalty of two hundred and fifty dollars.

Witness the Hon. Thomas H. Duval, judge of said court, and seal of court, at the city of Austin, this 2d day of May, A. D. eighteen hundred and fifty-nine, and eighty-third year of the independence of the United States.

[L. S.] MATHEW HOPKINS, *Clerk.*

The defendant is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of July next, otherwise the bill will be taken as confessed.

42 MATHEW HOPKINS, *Clerk.*

The following return appears upon the original of the above subpœna, to wit:

Return.

Came to hand on the seventh day of May, A. D. 1859, and executed on the seventh day of May, 1859, by serving Samuel A. Maverick, the within-named defendant, in person, with a true copy of this subpœna, in the county of Bexar, 80 miles from the city of Austin.

WM. C. YOUNG,
U. S. Marshal W. D. Texas,
By SAM'L NEWTON, *Deputy.*

And it appears that on the 4th of May, 1859, subpœnas were issued to the following persons, but not served, to wit: George W. Price, William F. Luckie, surviving brother and heir at law of Samuel Luckie, dec'd; Archibald Hodge, Miles M. Battell, James A. Mason, heir at law of James P. Hudson.

And it appears that on the 22d of September, 1859, an alias subpœna was issued to Miles M. Battell, and upon the original thereof is the following return, viz:

"The within-named Miles M. Battell not found in my district.
"H. E. McCULLOCH, *U. S. M.*,
"By S. M. STORY, *Act'g.*"

And the following entry appears upon the rule book of this court, to wit:

Rule taking bill pro confesso as to def'ts served.

Sept. rules, Sept. 5th, 1859.

BAINBRIDGE D. HOWARD HEIRS *vs.* ARCHIBALD HODGE ET AL. } No. 10.

AT RULES, *September 5th, A. D. 1859.*

43 It being made to appear from an inspection of the papers in this cause that subpœnas issued upon the bill to revive and answer, filed therein on January 29th, A. D. 1859, had been duly served more than twenty days prior to the rule day in July last, upon which day said subpœnas required appearance to be entered, upon Samuel S. Smith, Samuel A. Maverick, Willard Richardson, John H. Herndon, William E. Howth, Antonio Sierra and Maria, his wife, and Juan Garza and Adolfo Garza, the infant sons of said Maria, it is ordered that said bill be held to have been revived as of course; and inasmuch as each of said defendants has failed to enter an appearance on the rule day in July last, and has also failed to answer said bill as revived, it is further ordered that said bill be taken for confessed as against each of them, and that alias subpœnas be issued for each of the residue of the defendants that have not been served that complainants by their solicitor may desire.

ALEXANDER,
Sol. for Complainants.

Attest: MATHEW HOPKINS, *Clerk.*

Also on the 25th of June, 1860, the following agreement in writing was filed, to wit:

Agreement to set aside judgment at rules pro confesso.

In the district court of the U. S. for the western district of Texas, at Austin.—June term, A. D. 1860.

B. D. HOWARD'S HEIRS *vs.* HODGE ET AL. } No. 10, ch'y.

44 It is hereby agreed that the decree in the above entitled and numbered cause, entered on the fifth day of September, A. D. 1859, taking the bill pro confesso, be set aside, the defendant Herndon to pay the one-half of all the costs of complainants as to said defendant Herndon to date; that the complainants have leave at any time before next rule day to file a supplemental bill in the nature of a bill of revivor; and that such of the defendants as are parties to this agreement shall appear without further process, and are to have the time extended to them until the third rule day after the filing of supplemental bill, &c., to answer the same. This agreement is to be entered as an order in said cause, and is not to prejudice the complainants in making parties, or in their proceedings against any other persons than those who subscribe the same. The death of the defendant Howth is suggested and said decree is set aside as to him. The words "as to said defendant Herndon" interlined above before signing.

Austin, June 20, 1860.

I. A. & G. W. PASCHAL,
For Herndon.
SAMUEL A. MAVERICK.

And the following order appears upon the chancery minutes of this court, to wit, June 25th, 1860:

Order pursuant to agreement.

On this day the court then sitting on the law side of the court, the following order was had in equity:

45 BAINBRIDGE D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET AL. } 10, chancery.

On this day came the solicitor for complainants, William Alexander, and on his motion and upon the agreement filed therein, it is ordered that the decree entered on the fifth day of Sept., A. D. 1859, taking the bill pro confesso, be set aside, the defendant Herndon to pay one-half of all the costs of complainants as to said defendant Herndon to date; that the complainants have leave at any time before next rule day to file a supplemental bill in the nature of a bill of revivor; and that such of the defendants as are parties to this agreement shall appear without further process, and are to have the time extended to them until the third rule day after the filing of supplemental bill, &c., to answer the same. The agreement and order therein not to prejudice the complainants in making parties or in their proceedings against any other persons than those who subscribe the same. The death of defendant Howth being suggested, the decree not to operate as to him.

The following order appears upon the chancery minutes of this court, to wit:

Order giving leave to file supplemental bill & reviving suit, &c.

June term, A. D. 1860, June 29th, 1860.

B. D. HOWARD'S HEIRS *vs.* HODGE ET ALS. } In ch'y, No. 10.

46 On motion of the solicitor for the complainants, it is ordered by the court that complainants have leave now to file in open court their supplemental bill as is stipulated in the agreement filed therein at this term. It is further ordered that this suit stand revived in the name of Volney E. Howard, Thomas H. Bennett and Caroline H. Bennett, his wife, Ephraim H. Lombard and Julia A. Lombard, his wife, and Mehitabel Howard, as against the parties against whom a decree pro confesso has been entered, which has not as to them been set aside, and as against the defendants John H. Herndon and Samuel A. Maverick; and that Francis Wurzbach, on being served with a subpœna, be made a party defendant to said bill.

And thereupon complainants, by their solicitor, filed a supplemental bill, which is endorsed as follows, to wit: No. 10, ch'y. B. D. Howard's heirs vs. Hodge et al. Supplemental bill filed by order of court. June 29, 1860. M. Hopkins, clerk. Alexander, solicitor for complainants.

Supplemental bill.

To the judge of the district court of the United States for the western district of Texas, having circuit powers and jurisdiction, setting at Austin:

Humbly complaining, your orators, Volney E Howard, who is a citizen of the State of California; Thomas H. Bennett and Caroline H.
47 Bennett, formerly Howard, his wife; Ephraim H. Lombard and Julia A. Lombard, formerly Howard, his wife; and Mehitabel Howard each of whom is a citizen of the State of Illinois, show unto your honor that their citizenship is as they have stated; and that they, together with Richard A. Howard and Amelia L., his wife, who was the widow of Bainbridge D. Howard, deceased, and Russell Howard, are the sole surviving heirs at law of said deceased; said Mehitabel being the mother; said Amelia L. having been the widow; said Caroline H. and Julia A. being the surviving sisters; and said Volney E., Richard A., and Russell being the surviving brothers, of said deceased, whose father died in his lifetime. And your orators aver that said Bainbridge D. Howard did in his lifetime, to wit, on the seventeenth day of February, A. D. 1851, file his bill of complaint against Archibald Hodge, Miles M. Battell, George W. Price, R. C. Garza, W. E. Howth, J. H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, unto which they file this their supplemental bill in the nature of a bill of revivor; and that said Bainbridge D. Howard departed this life at sea on a voyage from the United States of America to Italy, in the autumn of said A. D. 1851, before said defendants had filed their answer to his said bill of com-
48 plaint. And your orators further aver that since the decease of the said Bainbridge D. Howard, deceased, said Richard A., Amelia L., and Russell Howard have, by conveyance signed, sealed, and delivered, conveyed their entire interest in and to the tract of land in said bill of complaint described unto the said Volney E. Howard. And your orators, adopting the allegations of said bill of complaint touching the original grant of said tract of land from the government of Spain, and also the description thereof therein given, further represent that by regular and complete conveyances the fee-simple title granted by said government of Spain to the Indians of the population of the mission of San Jose was granted unto one John McMullen, now deceased, who thereby became vested with all the right, title, and interest in and to the land described as aforesaid, and with the actual possession thereof. And your orators further aver that for a valuable consideration therein expressed said John McMullen in his lifetime, to wit, on the fifth day of November, A. D. 1849, executed an instrument or covenant in writing by him signed, but which, through mistake, was not sealed and witnessed by two witnesses, so as to take effect as a deed, as was in-
49 tended, unto said Bainbridge D. Howard, deceased, who thereby became vested with the equitable title to, and obtained actual possession of, said tract of land, though he departed this life as aforesaid without having discovered said mistake, & without having caused his equitable title to be converted into a legal title as he was of right entitled to do. And your orators aver that some time after the execution of said instrument or covenant, whereby said John McMullen conveyed the equitable title to said tract to said Bainbridge D. Howard, deceased, said John McMullen departed this life, and that
are his sole heirs at law; and your orators averring that by the laws in force at the time of the orginal

grant to said Indians, and subsequently thereto, operating on said grant and the contract indicated thereby, an indefeasible estate in fee was vested in said Indians, and in those claiming and deraigning title through them down to and including said John McMullen, deceased; and that a valid equitable title to said tract was made by said McMullen to said Bainbridge D. Howard, dec'd, which is now vested in
50 your orators as his heirs at law, and as aforesaid; all of which will more fully and at large appear by the grant to said Indians, together with the chain of conveyances down to said McMullen, and by said instrument; to all of which, or to certified copies of the records thereof, if the originals cannot be produced, for greater certainty, at the hearing hereof, your orators crave leave to refer.

And your orators further aver that since the death of said John McMullen and of said Bainbridge D. Howard said heirs at law of said McMullen, although well apprized of all that has been hereinbefore alleged, have wholly neglected and failed, and still continue to neglect and fail, to make unto your orators a legal title, as in equity and good conscience they were bound to do, to said tract of land. And your orators further aver that since the commencement of this suit said Miles M. Battell, R. C. Garza, W. E. Howth, James P. Hudson, and Samuel Luckie have departed this life; and that they have ascertained that said James A. Mason is not a citizen of the State of Texas, and has and claims no interest in any part of said tract; and that said Archibald Hodge has sold out his interest in said tract to John H. Herndon, who
51 likewise, since the commencement of this suit, and prior to the decease of said Miles M. Battell, purchased his interest in said tract. And they further aver that the heirs at law of said Samuel Luckie, deceased, are not citizens of the State of Texas; and that said W. E. Howth, deceased, as they have recently been informed and believe, had no interest or claim in and to said tract, or any part thereof; and that the heir at law of said James P. Hudson, deceased, is not a citizen of the State of Texas.

Yet your orators aver that although they were in possession of said tract, having title thereto as aforesaid, said John H. Herndon and Samuel A. Maverick, they being the only ones of the original defendants as to whom the original bill of complaint of your orators has not been abated as aforesaid by death, or else stands taken pro confesso, together with one Francis Wurzbach, who is a citizen of the State of Texas, have, contrary to equity and good conscience, cast a cloud upon the title of your orators, and have endeavored to subject them to harrassing and vexations litigation, and to cause them to be involved in a multiplicity of suits at law by their actings and doings, as hereinafter set forth. And they aver that said Herndon and Maverick, for the purpose of wronging and injuring your orators in the premises, and
52 well knowing what is herein alleged, have, jointly or separately, in their own names, and in the names of others, made, and caused to be made, locations and surveys on large portions of said tract, by virtue of certificates, or warrants, or other rights to location issued and acquired under the laws of the republic and State of Texas; but whether they, or either of them, have obtained patents upon their said surveys your orators are not informed; and by virtue of said locations, surveys, and patents, if obtained, said parties pretend that they have obtained a right to so much of said tract as may be covered by said locations, surveys, and patents if obtained. And said parties have also bought and obtained from persons having similar claims to their own other portions of said tract. And your orators aver that said Francis

Wurzbach, pendente lite, and with full knowledge of what is herein stated, likewise bought and obtained conveyance for a similar claim to a portion of said tract. And your orators aver that although said defendants Herndon, Maverick, & Wurzbach well knew that said locations, surveys, and patents, if obtained, together with their said purchases of similar claims, were void and of none effect, and formed a cloud
53 upon the title of your orators, and would force them to become involved in a multiplicity of suits, still in order to harrass and farther wrong your orators, they sold and conveyed, and bound themselves to sell and convey, to divers persons, to your orators unknown, pendente lite, divers parts of the portions of said tract respectively claimed by them as aforesaid; all of which is contrary to equity and good conscience. Yet your orators, inasmuch as those under whom they claim had good title and were in actual occupation of said tract, and as they had and have good equitable title thereto, and are in actual occupation thereof, had well hoped that they would have continued and remained in such occupation and possession undisturbed, without litigation, without any cloud upon their title, and without the necessity of harassing and vexatious litigation as to the same. But now, so it is, may it please your honor, that the said defendants, combining and confederating together, and with divers other persons, at present unknown to your orators, but whose names, when discovered, your orators pray they may be at liberty herein to insert, and make parties defendants hereto, with proper and apt words to charge them, and contriving how to wrong and injure your orators in the premises, have, when re-
54 quested to act in accordance with equity and good conscience as to your orators, absolutely refused, and still continue to refuse, to comply with such requests. And the said heirs of the said John McMullen sometimes pretend that the allegations hereinbefore made touching them are not well founded, and that they ought not to convey the legal title to said tract to your orators. Whereas your orators charge the direct contrary thereof to be the truth, and charge that said instrument is good and valid as an equitable title, and that inasmuch as said Richard A., Amelia L., and Russell Howard have conveyed to your orators, that your orators are entitled to have the legal title to said tract conveyed to them by said heirs, in accordance with the effect of said instrument executed as aforesaid by their ancestor, said John McMullen, deceased. And the other defendants, said Herndon, Maverick, and Wurzbach, sometimes pretend that the government of Spain did not grant said tract of land unto said Indians, but gave them only a beneficiary interest or use therein, and that the grant made by said government has been revoked or annulled; that such revocation or annulment was valid without office found; and that said tract, though once appropri-
55 ated and tilled, by means thereof became a part of the public domain, and became subject to location, survey, and patent; that they had no notice that said tract was not vacant and patentable land; and that your orators are unable to deraign their title, as has been hereinbefore set forth, from said Indians. Whereas your orators charge the direct contrary thereof to be the truth; and further charge that said last-named defendents at other times give out and pretend that they are unable to give an accurate statement of the various portions of said tract that they have bought or located, or caused to be surveyed and patented, or that having claim to, they have sold and conveyed; and assert that all their actings and doings touching the same are of record and hence ought not to be discovered by them, and pretend at the same time to be wholly ignorant of what is manifest of record, touching the

title of your orators as is hereinbefore stated. Whereas your orators charge the direct contrary thereof to be the truth. And your orators further charge that there are now in the separate possession of each of defendants, or under their control, some writings having relation to, or making allusion to, the matters in question, or some one or more of them, whereby the truth of the statements and charges aforesaid, or some of them, would clearly and fully appear. And your orators
56 here seek from each of said defendants description and full particulars, well arranged so as to form an intelligible schedule, with all proper dates and descriptions therein distinctly set forth, so that the parties and matters alluded to by the contents of said schedule may be plainly and succinctly manifest.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full and direct and proper answer make to such of the several interrogatories hereinafter mentioned and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

Interrogatories subjoined.

1. Whether the allegations in the stating part hereof, touching the heirs at law of said John McMullen, deceased, are true in each and every particular; and if nay, wherein are they otherwise?

2. Whether each of the defendants has not in his own name located, and when, caused to be surveyed, and when, caused to be patented, and when, any, and what portions, of said tract; describing them particularly, and stating the number of acres?

57 3. Whether each of defendants has not in the name of any, and what, other person or persons, caused to be surveyed, and when, on locations, and when made, caused to be patented, and when, any, and what portions of said tract; describing the same particularly, and stating the number of acres?

4. Whether each of said defendants has purchased, and when, from whom, and how much, any, and what portions of tracts located within the limits of said tract; whether they have sold, and when, to whom, how much, and for what consideration, any, and what portions of the several tracts claimed by them and situate within the limits of said tract?

5. Whether each of said defendants has claimed, or now claims, and by what title, any, and what portions of land situate within the limits of the tract claimed by your orators, as in the original bill set forth?

6. Whether any and what other locations have been made upon said tract by any and what other persons, with or without the example or advice of defendants, or some of them, stating particularly why they were so made?

7. Whether each of the several allegations, in the charging part of this bill, is not true; and if nay, wherein in each and every particular is it otherwise?

And your orators praying that said heirs at law of John Mc-
58 Mullen, deceased, may be decreed to convey the legal title to said tract unto them, and that your honor may provide by your decree that the legal title aforesaid be divested from said heirs and vested in your orators, pray as in the said original bill.

May it please your honor to grant unto your orators the United States

writ of subpœna, directed to said Francis Wurzbach alone, (said defendants Herndon & Maverick having appeared by an agreement on file,) commanding him to be and appear in this honorable court, in the time and manner prescribed by the rules governing the same, and further to stand to, and perform, and abide such further order, direction, and decree therein as to your honor shall seem meet; and that said defendant Francis Wurzbach, upon being served, &c., may be bound by all the proceedings in this cause. And your orators shall ever pray.

ALEXANDER,
Solicitor for Complainants.

CITY OF AUSTIN, *June* 29th, 1860.

NOTE.—The defendants, the heirs at law of said John McMullen, deceased, are required to answer the interrogatory numbered 1.

The defendant Francis Wurzbach is required to answer the interrogatories numbered 4, 5, & 7.

The defendants John H. Herndon and Samuel A. Maverick are required to answer the interrogatories numbered 2, 3, 4, 5, 6, and 7.

59 ALEXANDER.

The word "against" on page 1, and the word "title" on page 6, interlined before signing; an erasure or crossing-out of same words repeated on page 9 is also noted before signing.

ALEXANDER.

And the following entry appears upon the rule book of this court, to wit:

Rule taking bill pro confesso.

October rules, 1860.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } 10, chanc'y.

The defendants Maverick and Herndon having failed to answer the bill in compliance with the order granting further time at the June term, 1860, and the time to answer having expired, the complainants take their bill as them and other defendants duly subpœnaed, &c., as confessed.

R. A. ALEXANDER,
Solicitor for Complainants.

Entered Oct. 1, 1860.

M. HOPKINS, *Clerk.*

And the following entry appears upon the rule book of this court, to wit:

Motion for entry of judg't pro conf. and for reference to the master.

THE HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. } No. 10, in chancery.

In the above entitled and numbered cause the complainants by their solicitor move the court that so soon as the said cause may be

60 reached in the call of the chancery docket at next term, a decree be entered in their favor on their supplemental bill, &c., as taken pro confesso at last rule day, and on the answer of the heirs of John McMullen, deceased, which by agreement of counsel is to be filed in this cause as of this day, and that this honorable court do then order in said decree that reference be made to a master, or that defendants Herndon & Maverick be required to answer interrogatories to be filed against them by complainants touching the matters sought to be discovered by complainants, so that all the facts essential to the rendition of a final decree be ascertained; and that such further orders may then be made as said cause may require and as to equity may seem meet.

ALEXANDER,
Solicitor for Complainants.

NOVEMBER 5TH, 1860.
Attest: M. HOPKINS, *Clerk.*

The following motion appears upon the rule book of this court, to wit:

Motion by Herndon to set aside judg't at rules pro confesso.

Motion filed January 11th, 1861; Friday, Jan'y 11th, 1861.

BAINBRIDGE D. HOWARD'S HEIRS
vs.
ARCHIBALD HODGE ET AL.
} No. 10, chancery docket.—Motion.

And now at this time comes John H. Herndon, one of the defendants in the above-entitled cause, and moves the court to vacate and
61 set aside the order entered on the rule day of September last taking complainant's bill pro confesso, for the causes following, to wit: As this defendant is informed, said order was irregular, having been taken on a bill not sworn to, when the object of said bill was to seek a discovery, wherefore, as this defendant is advised, it was irregular to take as pro confesso such portions of the bill as sought discovery.

And further defendant says that he was in Austin in the spring of 1860, when complainant's counsel agreed to set aside the order taking his original bill as pro confesso on terms.

That defendant was travelling through the country till about the time the order was rendered for extending the time to answer, and that the supplemental bill was not filed till thereafter, nor was this defendant informed of the terms upon which the time to answer had been extended, nor as to the time when the supplemental bill had been filed, nor of the contents thereof; that if the counsel of defendant communicated this information to him, which is not known, he being now absent from the State, owing to the irregularity of the mails he did not receive the information; that even if defendant had been advised as to the contents of the supplemental bill and of the necessity of answering the same on or before the third rule day thereafter, he could not have
62 done so, as this defendant was residing at Velasco in Texas, about two hundred miles from the city of Austin, where it was necessary the bill should be answered, and from early in July until long after the rule day in September had passed, he had much and constant sickness in his family, in consequence of which he would have been unable to leave home to prepare his answer.

That if this defendant be required to answer the several interrogations propounded to him in the supplemental bill, which however he

does not admit, then he says he could not have answered said bill at all without the aid and assistance of his counsel and until he had examined the maps and records of the gen'l land office at Austin, or the maps and records of the land office at San Antonio, both of which places were some two hundred miles from where he was confined by reason of the sickness of his family; and this defendant is also advised and believes that it would have been necessary to have examined the records of Medina County before answering the complainants' bill, and that the said Medina County is still more distant from the place where defendant was residing.

JNO. H. HERNDON.

Sworn & subscribed to before me this Jan'y 11th, 1861.

MATHEW HOPKINS,
United States Commissioner.

Filed Jan'y 11th, 1861.

MATHEW HOPKINS, *Clerk.*

63 And afterwards, to wit, on the 15th day of January, A. D. 1861, the following entry appears upon the rule book of this court, to wit:

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD MCMULLEN ET AL. } 10, chancery.

JAN'Y 15TH, 1861.

And now come the heirs of McMullen and file their answer to the supplemental bill.

M. HOPKINS, *Clerk.*

And it appears from the papers of the cause that the heirs of McMullen, by their solicitor, Jacob Waelder, filed their answer in words, to wit:

Answer of McMullen's heirs.

THE HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET ALS. } No. 10.

The answer of John McMullen, Anthony McMullen, James McMullen, Neal McMullen, Ann McMullen, Morris Egan and Margaret Egan, wife of said Morris, late Margaret McMullen, all citizens of the State of Pennsylvania, and heirs of John McMullen, deceased, to the supplemental bill, in the nature of a bill of revivor, of the heirs of Bainbridge D. Howard, complainants.

And these defendants, voluntarily appearing and submitting to the jurisdiction of the court, say that they are informed and verily believe and hence admit that the allegations of said bill are true.

JACOB WAELDER,
Att'y for above-named Def'ts.

Filed January 15, 1861.

M. HOPKINS, *Clerk.*

64 And the following order appears in the papers of the cause, to wit:

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL.

On hearing the motion made in behalf of defendant Herndon in connection with the motion entered at November rules in behalf of complainants, it is ordered that a decree be entered in their favor against all the defendents, (except J. H. Herndon,) and reference be made to a master, &c., as prayed for in complainants' said motion, &c.; and that as to said defendant John H. Herndon, the order taking the bill pro confesso as to him be set aside, and that he have until the rule day in March next to answer the bill, on conditions that he pay all the costs of plaintiff in this case.

T. H. DUVAL.

And the following entry appears upon the chancery minutes of this court, to wit:

Order setting aside judg't pro conf. as to Herndon upon terms, and confirming same as to Maverick, and referring to the master.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
ARCHIBALD HODGE ET AL. No. 10, chancery.

On hearing of the motion made in behalf of defendant John H. Herndon, together with the motion entered in behalf of complainants at November rules, it is ordered that the motion of defendant Herndon be sustained, that the decree entered pro confesso as against him be
65 set aside, and that he have time extended to him to file his answer in this cause until the rule day in March next, upon condition that he shall pay all the costs of the complainants in this case, for which execution may issue upon this decree as upon a judgment at law. It is further decreed that said decree taking the supplemental bill, &c., of complainants pro confesso be confirmed and made final as to defendant Samuel A. Maverick; and that complainants, to wit, said heirs of Bainbridge D. Howard, deceased, have and recover of said Maverick the tract of land in the original bill described; and that their title to the same be and is hereby decreed to be free from all clouds cast thereupon by said Maverick and all persons claiming by, through, or under him, and that the patents, locations, and surveys obtained by said Maverick in conflict with the title of complainants, which is decreed to be good title, are and are, hereby adjudicated, to be null and void.

It is further decreed that a reference is hereby ordered to be made to Mathew Hopkins, esq., as master in chancery, to ascertain and report to this court, at an early day as practicable, all the material facts sought to be discovered by said complainants as against said defendant; and that he is empowered to examine said defendant on oath by interrogatories to him addressed to that end, in order that such additional
66 decree to this final decree may hereafter be entered as to equity may seem meet, said defendant being adjudged to pay all the costs of this cause heretofore incurred either by or about him and all the further costs thereof, for which execution may issue as to so much

20 H. 198.

thereof as have already accrued, as at law, after the adjournment of this term and for the residue after the next term of this court.

It is further decreed that the bill, &c., of complainants be dismissed without prejudice as to defendant Wurzbach.

It is further decreed that the legal title to the land in said bill, &c., of complainants described be and is hereby decreed to be vested in complainants as against the heirs at law of John McMullen, deceased, they having answered and submitting to the jurisdiction of the court, admitted all the material facts alleged against them.

And afterwards the following entry appears upon the rule book of this court, to wit:

March rules, Mar. 4th, 1861.

HEIRS BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } No. 10.

Now comes the defendant John H. Herndon and files his answer.

G. W. PASCHAL, *pro Def't.*

MATHEW HOPKINS, *Clerk.*

67 And on the same day, to wit, March 4th, 1861, J. H. Herndon, by his solicitor, filed his answer, endorsed as follows, to wit:

Heirs of Bainbridge D. Howard vs. J. H. Herndon. Answer of J. H. Herndon.—Filed March 4th, 1861. M. Hopkins, Clerk.

And which is in words, &c., as follows, to wit:

Answer of J. H. Herndon.

UNITED STATES OF AMERICA:

In the district court of the United States for the western district of Texas, at Austin.

The separate answer of John H. Herndon to the bill in chancery and the bill of revivor, exhibited against this defendant in the case of Bainbridge D. Howard, complainant, against Archibald Hodge and others, defendents, in the district court of the United States aforesaid.

This defendant, John H. Herndon, now, and at all times hereafter, saving and reserving to himself all manner of benefit and exception to the manifold errors, insufficiences, inconsistencies, contradictions, impertinencies, and want of equity in the bill of complainant contained, for answer thereto, or to so much thereof as he is advised and believes it is necessary for him to answer unto, answering, says:

That as to the charge that, on or about the twenty-second day of November, in the year seventeen hundred and seventy-six, the government of Spain, according to the forms of law, and by the regularly constituted officers of government, granted to the Indians of the
68 population of the mission of San Jose a certain tract or parcel of land of the description, calls, and boundaries in the complainants' bill of complaint set forth, this defendant knows nothing of his own knowledge, information, or belief, and he requires strict proof of the same, and as to the boundaries or localities of the pretended grant this defendant knows nothing, and requires strict proof thereof.

And further, this defendant says, that if ever any such grant was made, which is not admitted, but denied, he is informed and believes that the same was not a grant to the soil in fee, but a mere usufructory right, or right of occupancy, by certain Indians for their use, so long as they were identified with the mission of San Jose, which right of occupancy has long since expired and reverted to the government, so that there is not now, nor was there ever, any pretence of legal title in the said Indians, or any of them, or any descendant of theirs, which they could lawfully convey or transmit to any other person; that, in fact, no one of the Indians of said mission ever had a legal and transmissable estate in said land; wherefore this defendant denies that there ever was any such legal and valid title to the land described in the bill, or any other land, in conflict with any right of this defendant.

69 And as to any regular chain of complete conveyances in fee, from the said Indians then entitled to those, or him under whom the complainant claims, of all the right, title, and interest of the said Indians in and to the said land described in said bill, whereby the title was duly vested in said complainant, so that he was seized and possessed of the same in fee, this defendant knows nothing, and thinks it impossible in law that it can be true; and this defendant requires strict proof of the same.

And this defendant denies that the complainant, and those under whom he claims, is or were in possession of said land at the commencement of the suit.

And this defendant denies that he has combined or confederated with the other defendents named, or with any other person, to cheat or defraud the complainant, or to make locations upon the land described in the complainants' bill, nor has this defendant, jointly with the other defendants, or separately for himself, so far as he knows or believes, made locations upon the lands so described, by virtue of warrants, certificates, &c., and certainly this defendant has not disturbed the seizin or possession of the complainant, for he never had any.

70 But if this defendant has any locations, surveys, or patents in conflict with the lands in the complainants' bill described, (which is not admitted, but denied,) then this defendant says that they are legal and valid, and upon lands heretofore vacant; and that he, and those claiming under him, hold the same by long-continued possession, and by valid adverse title; and therefore, if the complainant has any cause of action, it is strictly in a court of common law; and this defendant will insist that this court has no jurisdiction of said cause, and will insist upon it as upon demurrer.

And in answer to the first special interrogatory, this defendant says that he does not know the boundaries set forth in the complainants' bill, and therefore he cannot say whether or not he has any locations, surveys, or patents within the boundaries of said pretended grant; if he has, his titles have been perfected into patents, the records whereof are in the general land office, and where he holds by derivative title the records thereof are in the county clerk's office of Medina & Bexar counties, and the field notes of surveys are in the district surveyor's office, of the Bexar land district; and from these records the complainants can as well judge of the question of conflict as this defendant; if a conflict there be, this defendant will produce the evidences of his title at the hearing.

71 In answer to the second interrogatory, this defendant cannot say whether he has any locations, or how much, within the boundaries set up in the complainants' bill, as he cannot tell what boundaries or lands the pretended grant covers, if indeed there be a grant.

Third. This defendant cannot answer for either of the other defendants.

Fourth. This defendant knows nothing of the locations and surveys of strangers to the bill, and if he did, he insists that he is not bound to answer such a fishing question.

And as to the matter and things set forth in the bill of revivor, this defendant says that personally he knows nothing of the life or death of the complainant, Bainbridge D. Howard, nor whether he died childless, or not; though he has understood that his widow had a posthumous child, born after the death of said Bainbridge D. Howard, and he will require strict proof that he died childless.

And as to the conveyances described in said bill of revivor, this defendant knows nothing.

He has already denied the of mesne conveyances, and will require strict proof thereof. This defendant further answers and says that, as to whether John McMullen, did, on the fifth day of November, A. D 1848, or at any other time, execute an instrument or covenant in writing, by him signed, but which was not sealed and witnessed by two witnesses, so as to take effect as a deed, unto said Bainbridge D.
72 Howard, this defendent knows nothing. But this complainant insists that any such instrument was void, as well for the reasons set forth by the complainants themselves, as because this defendant is informed and believes, and therefore charges, that if any such unsealed pretended act was made, it was a fraudulent and void contrivance on the part of John McMullen to give jurisdiction to the federal court, when the said McMullen and all the other defendants were citizens of Texas; and after said McMullen had sued the defendants named in the original bill, in the district court of the county of Bexar, in the State of Texas, in which suit, on the day of , A. D. 1847, a judgment had been rendered in favor of the defendant Archibald Hodges, from which judgment the said McMullen appealed, and on the day of , A. D. 1848, the judgment of the district court, declaring the pretended grant void, was affirmed; after which the complainant dismissed his suit as to the other defendants, and then, to try to give jurisdiction to the federal court, the said McMullen combined and connived with said Volney E. Howard, one of the complainants in the bill of revivor, to bring the suit in the name of the said Bainbridge D. Howard, without any conveyance having been paid to said Bainbridge, and without his having paid one dollar therefor; but the whole was a beneficial
73 arangement for said McMullen and Volney E. Howard, who was to have a large part of the land for his services, and who was thus, at the commencement of the suit, a citizen of Texas, as was also the said John McMullen, so that, in truth and in fact, this court had not, nor has it now, any jurisdiction of the subject-matter, but the attempted jurisdiction was and is a fraud, as this defendant will prove at the hearing.

This defendant denies that ever the said Bainbridge D. Howard had any legal title or valid equitable title in and to said land, and therefore, at the time of the commencement of the suit, the federal court had no jurisdiction of the cause.

This defendant here again denies the grant and the validity thereof, and of the pretended mesne conveyances, and particularly and specially he denies the legal heirship and right of those Indans who pretended heirship and right of inheritance.

And now, because the complainants on the face of their supplemental bill set forth and show that the said John McMullen did by deed con-

vey to said Bainbridge D. Howard, and that the heirs of John McMullen never have conveyed the legal title to said Bainbridge D. Howard, this defendant will insist, as if upon demurrer, that the said
74 Bainbridge D. Howard never had any title to the land, and therefore that there is no equity in the complainants' bill of complaint.

This defendant believes that the other material averments in the supplemental bill as to this defendant have been answered in the answer to the original bill.

He insists that the complainants never had possession of said land, and therefore there is no equity in the bill.

And in answer to the first interrogatory in the supplemental bill, this defendant says that he knows nothing touching the heirs of John McMullen refusing to execute title to the complainant, nor indeed who McMullen's heirs are; but as the bill shows that the legal title is in them, it is very apparent that they are necessary parties, without whom the bill must be dismissed.

In answer to the second interrogatory, this defendant says that he does not know the boundaries claimed by the complainants, and therefore can give no further answer about his own titles or any pretended conflict.

He gives the same answer to the third fishing interrogatory.

In answer to the fourth interrogatory, this defendant gives the same answer for the same reasons, and he insists that he is not bound
75 further to answer the same.

This defendant is obliged to give the same answer to the fifth interrogatory, and to insist that he has nothing to do with the locations and titles of the other defendants.

In answer to the seventh interrogatory, this defendant cannot say that each of the allegations in the charging part of the bill are true. On the contrary, he denies the existence and legality of the grant, and insists that the supreme court of Texas has judicially determined that it is invalid and confers no title. He denies the mesne conveyances, and particularly that ever McMullen had title, or that he ever conveyed any legal title to Bainbridge D. Howard. He denies that the complainants are the heirs of Bainbridge D. Howard, and will insist upon strict proof of it.

Without this, that there is any other matter or thing in the complainants' said bill of complaint not herein admitted, traversed, or denied is true; and this defendant, having fully answered, prays to be hence dismissed with costs.

I. A. & GEO. W. PASCHAL,
Sol. pro compl't Jno. H. Herndon.

UNITED STATES OF AMERICA, *District of Texas:*

Before the undersigned, chief justice of the county court of Brazoria County, personally appeared John H. Herndon, who on oath
76 says that the matters and things set forth in the foregoing answer, so far as stated on his own information, knowledge, and belief, are true, and so far as stated on the knowledge, information, or belief of any other person, he believes them to be true.

In testimony whereof I hereunto sign my name and affix the seal of the county court this 26th February, A. D. 1861.

[L. S.] S. W. PERKINS,
Chief Justice of the County Court of Brazoria County.

The following entry appears upon the rule book of this court, to wit:

At March rule day, 1861.

HEIRS OF BAINBRIDGE D. HOWARD
vs.
J. H. HERNDON ET AL. } No. 10, in ch'y.

In this cause, it being apparent that the defendant John H. Herndon has not performed the condition precedent to his being permitted to file an answer imposed upon him by the order of this court at its last term, and that said defendant has not filed any sufficient and sworn answer prior to this day, as he might have done had he complied with said order, complainants, by their solicitor, enter their order taking their supplemental bill, bill; and other pleadings for confessed as against him, said defendant, and file it; at the same time, without waiving any ground taken in this order at rules, file their motion of course
77 against said defendant, touching a paper purporting to be an answer improvidently filed this day.

ALEXANDER,
Solicitor for Compl'ts.

The following entry appears upon the rule book of this court, to wit:

Motion to strike Herndon's answer from the files.

March rules, M'ch 4, 1861.

HEIRS BAINBRIDGE D. HOWARD
vs.
JOHN H. HERNDON, &c. } In ch'y, No. 10.

In this case the complainants, by their solicitor, move the court as of course to order that a paper, improvidently marked filed on this day, (March 4th, 1861,) be stricken from the files at the cost of the defendant John H. Herndon, whose answer it purports to be, for the following causes, to wit:

1st. Because said defendant Herndon is in contempt in this, that he has not paid all the costs decreed against him, as a condition precedent to his being permitted to answer at all; that he failed to file any answer within the limit assigned him, which was until this day; that he has committed a further contempt by filing a paper purporting to be an answer, without notice, leave, or performance of any one of the conditions precedent imposed upon him after a second pro confesso by the court.

2d. Because said paper, purporting to be an answer, has no sufficient jurat or affidavit appended thereto, and is not sworn to before
78 a competent officer.

3d. Because of other grounds apparent from said paper when considered in reference to the papers and record of this cause, as well as for causes manifest on the face thereof, which show it to be a nullity.

ALEXANDER,
Solicitor for Complainants.

MARCH 4, 1861.

The following decree appears upon the chancery minutes of this court, to wit:

Circuit court of the United States for the western district of Texas, in chancery sitting.—June term, 1866.

WEDNESDAY, *June 20th*, 1866.

The court met pursuant to adjournment, when the following proceedings were had:

HEIRS OF BAINBRIDGE D. HOWARD *vs.* ARCHIBALD HODGE ET AL. } In chancery, No. 10.

On the hearing of the motion of the solicitor for the complainants in this cause, filed March 4th, 1861, to strike the answer of the defendant John H. Herndon from the files, he being in contempt for the cause therein set forth, it is ordered that the same be and is hereby sustained, and that said answer is ordered to be stricken from the files accordingly. On motion of sol'r for compl'ts, it is further ordered that the order taken at rules on the fourth day of March, A. D. 1861, taking the supplemental bill and other pleadings of complainants for con-
79 fessed, be confirmed and made final as to the said defendant John H. Herndon. And whereas on the 30th day of January, A. D. 1861, a final decree of the dist. court of the United States for the western dist. of Texas, sitting in chancery, was entered against Sam'l A. Maverick, one of the co-defendants in this suit, and since that time the jurisdiction of said court has been changed by law, and said cause is now pending in the circuit court of the United States for the west. dist. Texas, sitting at Austin, it is hereby, on the final hearing of said cause, on the pleadings, orders, and proofs submitted therein, ordered, adjudged, and decreed that the complainants, Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, and Caroline H., (formerly Howard,) his wife, Ephraim H. Lambard and Julia A., (formerly Howard,) his wife, and Mehitabel Howard, who are the heirs at law of Bainbridge D. Howard, dec'd, have and recover of said Samuel A. Maverick & John H. Herndon the tract of land in the original bill of complaint described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by said defendants, and all persons claiming or to claim by, through, or under them. Said tract of land is described as follows, to wit: A certain tract or parcel of land on or about the 22d day of November, A. D. 1766, granted by the
80 gov't of Spain, according to the forms of law, to the Indians of the mission of San Jose, and by them conveyed to John McMullen, since dec'd, beginning on the top of Padron Hill; thence, running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a landmark near the road leading to the presidio of the Rio Grande; thence, along the road westwardly, to the arroyo or creek Palabina, where there was placed a landmark; thence, turning towards the north to the road that comes from the cañon to the Loma Alto, where was placed a landmark by piling stones a short distance from the landmark of Baltazar Perez, an adjoining proprietor; thence, following an east course to the said Padron Hill, to the place of beginning; said tract lying in the counties of Bexar and Medina, in the State of Texas, and being now commonly known as the pasture land of the mission of San Jose.

It is further ordered and decreed that all patents, location, and surveys obtained or owned by said defendants Maverick & Herndon, which are in conflict with the title of complainants which is decreed to be a good title, are, and are hereby adjudicated, to be null and void, and that said defendants shall cancel & remove the same. It is further decreed that a reference is hereby ordered to be made to Mathew Hopkins,
esq., as master in chancery in this court, to ascertain and report to
81 this court, at as early a day as may be practicable, all the material facts sought to be discovered by said complainants as against the defendents aforementioned, and that he be empowered, if necessary, to examine said defendants on oath by interrogatories addressed to them, to the end that such additional decree may be hereafter entered herein as to equity may seem meet, said defendants being adjudged to pay all the costs of this cause incurred and to be incurred in consequence of this decree, for which, so far as already incurred, execution may issue as at law after the adjournment of this term, and as to the residue after the adjournment of the term or terms prior to and during which they may accrue.

It is further decreed that the bill of complaint be dismissed without prejudice as to defendant Wurzbach.

It is further decreed that the legal title to said tract of land in the original bill described be, and is hereby decreed, to be vested in the complainants, and that said master in chancery shall, as commissioner of this court, make, execute, and cause to be duly recorded a deed conveying the legal title thereof from John McMullen, Anthony McMullen, James McMullen, Neil McMullen, Ann McMullen, Morris Egan and Margaret, late Margaret McMullen, his wife, the heirs at law of John McMullen,
dec'd, to complainants, the said heirs at law having answered and
82 submitted to the jurisdiction of this court and admitted all the material facts alleged against them.

And afterwards, to wit, on the 3d day of December, A. D. 1866 Mathew Hopkins, master in chancery, filed his report, which is in words as follows, to wit:

Master's report.

B. D. HOWARD'S HEIRS *vs.* HODGE ET AL. } In chancery, No. 10.

In the circuit court of the United States, sitting in equity, at Austin, in the west. district of Texas.

Mathew Hopkins, who has been duly appointed and qualified as master in chancery of the circuit court of the United States, sitting in equity at Austin, in the western district of Texas, to whom a reference was made by a final decree of said court in the suit of Bainbridge D. Howard's heirs vs. Hodge et al., in chancery No. 10, at the June term of said court, in A. D. 1866, directing him to ascertain and report at as early a day as might be practicable all the material facts sought to be discovered by the complainants in said suit against the defendants Samuel A. Maverick and John H. Herndon, respectfully submits and files this his report:

Premising that since said reference was made to him, owing to having had to submit to a painful and hazardous surgical operation, and

83 to the prevalence of the Asiatic cholera as an epidemic in Bexar and Medina counties, in which the land in controversy is situate, together with various other causes, he has not had it in his power to visit said counties in person and to search and examine the records thereof, and to examine said Maverick, who resides in Bexar County, upon oath. He further states that he is informed and verily believes, and therefore reports, that since said decree was entered, said Maverick and Herndon have not been in Travis County, and that for some part of the time said Herndon has been without the limits of the State of Texas. He also states that neither of said defendants has paid, or caused to be paid, the costs adjudged against him in this suit.

After having examined such official statements and documents as have been prepared for him by the commissioner of the general land office of the State of Texas, and the comptroller, together with certain abstracts of the records of said counties, which are corroborated by said official statements and the papers of said suit, he reports that the defendant Maverick appears to have claimed to be the owner of the following described tracts of land, situate within the limits of the pasture lands of the mission of San Jose, as described in said decree, which are also sometimes known as the San Lucas lands, to wit:

84

No. of survey.	Original grantee.	No. of acres.	Remarks.
17	Francisco Seal	4,605	
16	Rafael Garza	Either ½ L. or 708	Patented to Maverick as ass'ee.
15	Anto. Chavaris	2,302	S. A. Maverick, ass'ee, not pat'd.
10	Gaspar Flores	4,605	" " patented.
396		960	

He further reports that the defendant Herndon appears to have claimed to be the owner of the following described tracts of land, situate within the limits of the land in said suit, described in said decree, to wit:

No. of survey.	Original grantee.	No. of acres.	Remarks.
1	James Cammell	4,605	The defendant Herndon in his sworn answer, which, though stricken from the file, is good as an affidavit, admitted that he owned the tracts marked *. Also, a tract for John H. Pilkin, viz: 1 L. & L. not patented, while the others are, and disclaims as to the rest.
324	Bartel and Hodge	354	
47	A. Stafford	640	
2	J. Foster	2,302	
25	J. Thompson	4,444	
198	P. M. Hughes	738*	
42	J. E. Calder	2,952*	
65	" "	1,476*	
4	J. Thompson	885*	
1032	" "	354	
41	J. Sharp	4,444	
196	W. R. Randle	624*	
14	S. H. Luckie	1,111*	
417408	J. Menmer	640	

The undersigned, for the causes hereinbefore stated, is unable to report more fully at this time, and has not been able to ascertain
85 whether or no said Maverick and Herndon purchased and claimed

prior to or at the time of the institution of said suit, or acquired in any manner pendente lite in their own names or in the names of any other person or persons, any other tract or tracts of land situate within the limits aforesaid.

The undersigned further reports that in pursuance to said decree, on the 3d day of December, A. D. 1866, he made a deed in triplicate, conveying all the title of the heirs of John McMullen, dec'd, to the tract of land herein described to the heirs of Bainbridge D. Howard, dec'd; two of the triplicate deeds to William Alexander, the solicitor of the said last-named heirs, who accepted the same in their behalf; said deed being herewith submitted, in order that upon the confirmation of this report, of which it forms a part, it may be withdrawn and recorded in each of the counties aforesaid.

The several papers on file in this suit, together with a book of abstracts, with a tabular statement appended, verified by affidavit and by comparison, and certain official statements obtained from the commissioner of the general land office of the State of Texas, showing the locations and surveys that have been made and returned lying within the limits of the tract in suit, and certain statements obtained
86 from the comptroller of the State of Texas, showing what is known officially in his office touching the giving in of a portion of them for taxes by the defendants Maverick and Herndon, together with the title-bond of John McMullen, dec'd, constitute the basis upon which this report is made; the unfiled documents having been by me marked "examined and identified," and numbered from 1 to 6, inclusive. This report has been made exclusively upon the facts developed by said papers and documents, no party having been summoned or notified to appear before me; the solicitor of the complainants having waived notice, and the defendants being in actual as well as constructive contempt, having failed to answer and to comply with the orders of the court previously made, not being entitled to notice. The cost of this report is taxed at ($500 00) five hundred dollars, which the master submits is within the fee of any respectable attorney, if called to render the same services; the cost of suit being additional, as will appear by the bill of costs to be filed in this suit before the next rule day. All of which is respectfully submittted.

MATHEW HOPKINS,
Master in Chancery, &c., & Commissioner.

Filed this 3d December, 1866.

MATHEW HOPKINS, *Clerk.*

87 And on the same day, to wit, December 3d, 1866, the following deed was filed, to wit:

THE STATE OF TEXAS, *Travis County:*

Know all men by these presents that, whereas by virtue of a decree rendered by the honorable the circuit court of the United States, sitting in equity in the western district of Texas, at Austin, at its June term, A. D. 1866, a certified copy of which is hereto attached, and is referred to as a part hereof, I, Mathew Hopkins, was authorized, directed, and empowered as master in chancery, and as commissioner of said court, to make, execute, and cause to be duly recorded a deed conveying the legal title of the tract of land therein described from John McMullen, Anthony McMullen, James McMullen, Neal McMullen, Ann McMullen, Morris Egan and Margaret, (formerly Margaret McMullen,) his wife, the same being the heirs

at law of John McMullen, deceased, to Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H., (formerly Howard,) his wife, and Mehitable Howard, the heirs at law of Bainbridge D. Howard, deceased, in consideration of the premises, and for the further consideration of the sum of one dollar, to me in hand paid by the heirs at law of said Bainbridge D. Howard, deceased, the receipt of
88 which is hereby acknowledged, I, Mathew Hopkins, as master in chancery, &c., as aforesaid, have granted, bargained, sold, & conveyed, and, by these presents, do grant, bargain, sell, convey, and confirm, all the right, title, interest, and claim which the aforesaid heirs at law of John McMullen, deceased, have or may have in and to the tract of land hereinafter described, to the heirs at law of Bainbridge D. Howard, deceased, aforesaid, said tract of land being more particularly described as follows: "A certain tract or parcel of land on or about the 22d day of November, A. D. 1766, granted by the government of Spain, according to the forms of law, to the Indians of the mission of San Jose, and by them conveyed to John McMullen, since deceased, beginning on the top of Padron Hill; thence, running from the north to the south, to the creek called the Alamos, at the crossing thereof, where there was placed a landmark near the road leading to the presidio of the Rio Grande; thence, along the road westwardly, to the arroyo or creek Palahuia, where there was placed a landmark; thence, turning towards the north to the road that comes from the cañon to the Loma Alta, where was placed a landmark by piling stones, a short distance from the landmark of Balthazar Perez, an adjoining proprietor; thence, following an east course, to the said Padron Hill, the place of begining;"
89 said tract lying in the counties of Bexar and Medina, in the State of Texas, and being now commonly as the pasture land of the mission San Jose; to have and to hold the same, together with all the rights and appurtances thereto belonging, or in any wise appertaining, to them the said heirs at law of Bainbridge D. Howard, deceased, & their heirs and assigns, forever.

In witness whereof I have hereunto, in my capacity as aforesaid, set my hand and affixed my scroll in lieu of seal, this first day of December, A. D. eighteen hundred and sixty-six.

(Done in triplicate.) MATHEW HOPKINS, [L. S.]
Master in Chancery.

Signed, sealed, and delivered in presence of the undersigned, each of whom is also witness to the signature of the other—
BEN WALKER.
J. M. BLACKWELL.

The decree attached is as follows: (being the same as found copied in this transcript, commencing on page 78;) and the following affidavit is on file among the papers of the case, to wit:

Pressler's affidavit.

HOWARD'S HEIRS *vs.* HODGE ET AL. } In chancery, No. 10.

This affiant, Charles W. Pressler, being first duly sworn, makes oath and says that the plat in triplicate of the pasture lands of the mission of San Jose, situate in the counties of Bexar, Atascosa, and Medina,

90 in the State of Texas, and marked with the name of John McMullen, together with the plats of surveys included within or partly so, or connected therewith, said plat having its boundaries tinted yellow, and being signed by himself and countersigned by M. Hopkins, as master in chancery, is a true copy of the tract known as the John McMullen tract, as the same is delineated on the old map of the Bexar land district, which is on file in the general land office of the State of Texas, and that the smaller surveys on said plat are also true copies.

Affiant further states that, at the request of the solicitor for the complainants in the chancery suit of Howard's heirs vs. Hodge et al., in ch'y No. 10, late pending in the circuit court of the United States for the western district of Texas, he has also platted out, in red, the Pita road, as given in certain field notes, alleged to have been made on a resurvey by John James; said road is in red, being different from that (in yellow) as found in the old map.

And further affiant saith not.

CHAS. W. PRESSLER.

AUSTIN, *January* 5, 1867.—Sworn and subscribed before me this 5th January, A. D. 1867.

MATHEW HOPKINS,
Master in Chancery.

91 The undersigned claims a fee of thirty dollars ($30 00) for the plat and connections in triplicate, and one dollar and a half as witness. 31 50.

CHAS. W. PRESSLER.

NOTE.—Execution issued Jan. 5th, 1867, on which is the following return:

"Not executed for want time.

"A. P. BLOCKER, *Marshall.*"

And afterwards, to wit, on the 7th day of January, A. D. 1867, Mathew Hopkins, master in chancery, filed a supplemental report, which is as follows, to wit:

B. D. HOWARD'S HEIRS
vs.
A. HODGE ET AL. } In chancery, No. 10.

In the circuit court of the United States, sitting in equity, at Austin, in the western district of Texas.

Mathew Hopkins, who has been duly appointed and qualified as master in chancery of the circuit court of the United States, sitting in equity, at Austin, in the western district of Texas, to whom a reference was made by a final decree of said court in the suit of Bainbridge D. Howard's heirs vs. Hodge et al., in chancery, now at the June term of said court, in A. D. 1866, respectfully submits and files this his additional report, the same being additional and supplemental to his report filed on the third day of December, A. D. 1866.

At the line next the bottom line of the third page of said report, instead of "Bainbridge D. Howard, dec'd, two of the triplicate
92 deeds," read "Bainbridge D. Howard, dec'd, and delivered two of the triplicate deeds," &c.

The master in chancery also reports that in the month of April, in A. D. 1861, the defendant Herndon paid in all fifty-six dollars and seventy-three cents, for which he is credited on the book of the clerk's office of this court. The payments made by said Herndon, amounting in all to the sum aforesaid, did not amount to a compliance with the order of this court, but would have been mentioned in said report had they not been casually overlooked. The defendant Maverick has paid no part of the costs of this suit. The master further reports that, having ascertained that the pasture lands of the mission of San Jose, which were conceded when Texas was a part of New Spain or Mexico, and which being for a long time in Bexar County, until the said county was subdivided, now lie in Bexar, Atascosa, and Medina counties. He has caused a plat of said pasture land to be made in triplicate, to be appended to and to form a part of the deed in triplicate mentioned and described in his original report; the boundary of said pasture land being marked in yellow; the line platted in red not being found on the map of Bexar land district on file in the General Land Office, is disregarded. Said plot in triplicate, proven to be a true copy of the same as found on the old map of Bexar land district, on file
93 in the general land office of the State of Texas, has been made on muslin and verified by the affidavit on file with the papers of this cause of Charles W. Pressler, late chief draughtsman of said land office, and each of the triplicates has been signed by him, and countersigned by the undersigned as master in chancery.

Fee taxed with the costs for Mr. Pressler for making said plat in triplicate, and for attendance, (31 50,) thirty-one $\frac{50}{100}$ dollars.

MATHEW HOPKINS,
Master in Chancery.

And upon the chancery motion record the following entry appears, to wit:

Motion by the master.

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } No. 10, in chancery.

In this case, in which a final decree was entered at the last term of this court, Mathew Hopkins, the then master in chancery of this court, and to whom, as master and commissioner pro hac vice, certain matters were referred under said decree, refers to his report filed on December 3d, 1866, and also to his additional and supplemental report filed on January 7, 1867, and to all the papers on file in suit, and also to all the papers whether identified by his signature or not, that have been inspected and examined by the undersigned, in order to make up said reports, together with said reports, and moves the court to allow his reason-
94 able costs, as the same have been taxed in said reports, by entering the following order, to wit:

In the United States circuit court.

B. D. HOWARD'S HEIRS
vs.
HODGE ET AL. } In chancery, No. 10.

In this case, in which a final decree was entered at the last term of

this court, referring certain matters to Mathew Hopkins, as master in chancery and as commissioner pro hac vice, it appearing to the court that said Hopkins has filed and entered a report on December 3d, 1866, and an additional and supplemental report on January 7th, 1867, wherein certain costs have been taxed, and that said reports, not having been excepted to, stand confirmed under rule 83; yet that said Hopkins has submitted to the court that his compensation as claimed therein be allowed by the court in accordance with the provisions of rule 82, on inspection of the papers referred to in his motion and of the record in this suit it is ordered that his compensation and the other costs as taxed by him in said report be fixed and allowed as is therein stated and set forth. It is further ordered that certified copies of said additional and supplemental reports be made out by said Hopkins in triplicate and attached to the deed in triplicate heretofore made by him, together with certified copies of this order. It is further ordered that the costs aforesaid be incorporated in such executions as may be issued.

95 All of which is respectfully submitted.

MATTHEW HOPKINS,
Late master in chancery & com'r in above case,
Per ALEXANDER, *his Solicitor.*

And the following entry appears upon the chancery minutes of this court, to wit:

Order sustaining motion by the master.

B. D. HOWARD'S HEIRS *vs.* HODGE ET AL. } In ch'y, No. 10.

THURSDAY, *Feb.* 21, 1867.

On consideration by the court, it is ordered that the motion filed and entered on Feb. 16th, 1867, be sustained, except in so far as compensation of the master in chancery and commissioner for making the original report is concerned, said compensation being reduced as is set forth in the following order, to wit:

B. D. HOWARD'S HEIRS *vs.* HODGE ET AL. } In chancery, No. 10.

In this case, in which a final decree was entered at the last term of this court referring certain matters to Mathew Hopkins as master in chancery and as commissioner pro hac vice, it appearing to the court that said Hopkins has filed and entered a report on Dec'r 3d, 1866, and an additional and supplemental report on Janury 7, 1867, wherein certain costs have been taxed, and that said reports, not having been ex-

96 cepted to, stand confirmed under rule 83, yet that said Hopkins has submitted to the court that his compensation as claimed therein be allowed by the court in accordance with the provisions of rule 82, on inspection of the papers referred to in his motion and of the record in this suit, it is ordered that his compensation and the other costs as taxed by him in said reports be fixed and allowed as therein stated and set forth, except that the compensation for the original report is allowed to the extent of $250 00 and no more.

It is further ordered that certified copies of said additional and supplemental report be made out by said Hopkins in triplicate and attached

to the deed in triplicate heretofore made by him, together with certified copies of this order. It is further ordered that the costs aforesaid be incorporated in such executions as may be issued.

Feb. 21, 1867.

(Signed) T. H. DUVAL, *U. S. Judge.*

The 2d execution issued in this cause having been returned unsatisfied, a third execution was issued as follows:

3d execution.

United States circuit court western district of Texas.

[*Third execution.*]

The President of the United States of America to the marshal of the western district of Texas, greeting:

Whereas Volney E. Howard and others, the heirs at law of Bainbridge D. Howard, deceased, on the 20th day of June, A. D. 1866, and
97 on the 21st day of February, in the year of our Lord eighteen hundred and sixty-seven, at our circuit court of the United States in and for the western district of Texas, have recovered against Samuel A. Maverick and John H. Herndon the sum of five hundred and eighty-two dollars eighty-nine cents, ($582\frac{89}{100}$,) costs, as taxed, as appears from a bill of costs hereto annexed specifying said costs, & which to the said Volney E. Howard & others, heirs at law as aforesaid, is now adjudged and decreed: These are therefore to command you that of the goods, chattels, and estates of the said Samuel A. Maverick & John H. Herndon, as you have been commanded, you cause to be made the full amount of this execution, together with legal fees and commissions for collecting the aforesaid amount; and that you have then this writ at the clerk's office of said court on the return day thereof, certifying how you have executed the same.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and seal of court, at Austin, this third day of June, A. D. 1867, and the ninetieth year of the independence of the United States.

[L. S.] MATTHEW HOPKINS, *Clerk.*

This execution is entitled to a credit of fifty-six $\frac{73}{100}$ dollars, ($56\frac{73}{100}$,) paid by John H. Herndon to me and to Wm. C. Young, marshal, in April, A. D. 1861, and is sent by instruction of William Alexander, late
98 solicitor for complainants, to Russell Howard, esq., of San Antonio, Texas, the agent of the heirs of Bainbridge D. Howard, deceased, to be proceeded with as he may direct.

MATTHEW HOPKINS, *Clerk.*

Bill of costs, (attached.)

In U. S. circuit court, Austin, chancery, No. 10.

BAINBRIDGE D. HOWARD'S HEIRS *vs.* ARCHIBALD HODGE ET AL. } Chancery, No. 10.

Clerk's orig'l bill of clerk's costs at Galveston 39 40

1851.	U. S. Marshal Bates:		
May 24. Feb. 21.	Mil., 4 sub's to San Antonio at different times, 250 miles ea., *a* 6.	60 00	
	Furnishing 4 copies same, 50, L..	2 00	
	Service 4, 2 00.....	8 00	
		——	70 00
1856.	Total orig. costs at Galveston.....		109 40
Jan'y 10.	To fil'g at Austin 19 papers.....	1 90	
1858.	" docketing cause.....	67	
Feb. 9.	" motion, order, & ent'g.....	30	
Dec. 6.	" fil'g & certif. dismissal.....	25	
	" rules ent'g.....	15	
Jan'y 1, 1859.	" filing & certif. motion.....	25	
	" rules ent'g.....	30	
3.	" fil'g & certif. affidavit, 25c., and affidavit, 25.....	50	
Jan. 29.	" fili'g & certif. bill to revive & ent'g.....	40	
Feb. 4.	" motion & order setting aside dismissal.....	30	
May 4.	" 12 orig. sub's & certif., $1 15.	13 80	
" "	" 12 copies for service fil'g certif. & ent'g ret's.....	11 25	
	" postage to eastern district...	15	
Aug.	Rules entry.....	15	
Sept. 22.	Filing certif. & ent'g returns, 4, 40.....	1 60	
	2 alias supb. & certif. & copies for same.....	3 00	
99 June 25, 1860.	To fil'g & certif. agreement....	25	
	" ent'g & docket order.....	30	
	" " order, &c.....	30	
29.	" " " "	30	
	" fil'g certif. supplemental bill.	25	
Oct. 1, 1860.	" ent'g pro confesso rules.....	30	
		——	
	Clerk's costs car'd forward..		37 67
	Total orig. costs at Galveston bro't for'd.....		109 40
	Clerk's costs at Austin bro't forw'd.....	37 67	
Nov. 1860.	Ent'g rules setting down for hearing	30	
Jan. 15, '61.	" filing 1 certif. answer McMullen's heirs	25	
15,	" ent'g rules.....	15	
30,	" ent'g decree.....	1 00	
	" docket fee, &c	2 00	
1861.	" fil'g & certif. cost bill & ——g papers	50	
Mar. 4.	" filing certif. and ent'g def'ts Herndon's answer.....	40	
	Rules comp't ent'g.....	50	
	Rules comp't "	50	

June 20, '66.	Ent'g motions, orders, & decree.		1 50	
Dec. 3.	Ent'g record rules, dec. rules & ent'g reports, &c.....		5 50	
	Filing & certifying sundry papers from master.....		1 00	
	Final record		50 00	
	Execution & certif. parties' costs		1 15	
	Total clerk's cost at Austin...			102 42
	Marshal Young's costs:			
	Mileage & service 3 writs.....		31 92	
	Marshal McCulloch's costs, east. dist:			
	For service & mil. 2 writs.....	28 00		
	Serv. & mil. 1 writ, 100, Austin Co.....	8 00		
			36 00	
	Draughtman & witness fee taxed			67 92
	in court order.....		31 50	31 50
	Master allowed by decree.....			250 00
	Solicitor's taxed fee, Alexander.			20 00
	This 3d execution.....			1 65
				$582 89

Taxed.

MATTHEW HOPKINS, *Clerk.*

100 Endorsements on 3d execution: In chancery, No 10. United States circuit court western district of Texas. Volney E. Howard et al., heirs at law of Bainbridge D. Howard, deceased, vs. Archibald Hodge et al., that is to say, Samuel A. Maverick and John H. Herndon. Third execution for costs, decree &c. Costs 582\frac{89}{100}$. Issued third day of June, 1867. Mathew Hopkins, clerk.

Received in office 25 day of September, A. D. 1867. A. P. Blocker, U. S. marshal, by H. Wier. This execution is to be controlled by Russell Howard, esq. Alexander, late sol'r for compl'ts.

Rec'd, of S. A. Maverick, San Antonio, July 29, 1867, the sum of two hundred and ninety-one & $\frac{45}{100}$ dollars, in full of one-half of the within execution by agreement; this is his share, & the remainder is to be collected from J. H. Herndon, without recourse upon said Maverick.

RUSSELL HOWARD,
Agt. for Compl'ts.

This execution rec'd in office September 25, 1867, and returned this Dec'r 20, 1867. Levy made, and having collected two hundred and sixty $\frac{11}{100}$ dollars without sale, which being only a part of the costs, this execution is returned not satisfied.

A. P. BLOCKER, *U. S. Marshal,*
By HENRY WEIR, *Deputy.*

Mar. orig'l cost on ex.....	75
Com's on am't coll'd	3 97
Levy & advertising.....	3 00
Mar. mil., 80.....	4 80
Ret'g ex'n.....	75
	$13 27

101 *Petition for appeal by Herndon.*

UNITED STATES OF AMERICA, *District of Texas:*

To the Honorable Thomas H. Duval, judge of the circuit court for the western district of Texas:

The petition of John H. Herndon, a citizen of the State of Texas, respectfully represents that, at a former term of the circuit court of the United States for the western district of Texas, at Austin, on the eighteenth day of June, 1867, a final decree was rendered by the said court in a certain cause then depending in said court, in chancery, wherein Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, Ephraim H. Lombard, Julia A. Lombard, and Mehitabel Howard were complainants, and Archibald Hodge, George W. Price, R. C. Garza, W. E. Howth, John H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, in the original bill, (and R. C. Garza, Samuel Luckie, and James P. Hudson, having died,) the bill was revived, or attempted to be revived, against Antonio Sieria, husband of Maria Antonia Veramendi y Seiria, widow of R. C. Garza, deceased, Juan Garza, and Adolfo Garza, heirs of R. C. Garza, deceased; and William F. Luckie, heir at law of Samuel Luckie, were defendants, as by the proceedings in said cause, now remaining of record in this court, will appear.

102 That the decree so rendered was imperfect, erroneous, and contrary to the rights of the said defendant, and the principles of equity, in several respects:

First. In ordering that the said defendant John H. Herndon should pay all the costs, and ordering execution therefor.

Second. In adjudging and decreeing that the said John H. Herndon was in contempt, when he was not, by the order of the court.

Third. In hearing the motion of the complainants, by their solicitor, William Alexander, over four years after the pretended filing of said motion, without the said motion having in fact been filed, and without any notice thereof to the defendant John H. Hudson, or his solicitor.

Fourth. In ordering that the answer of the defendant, the said John H. Herndon, to be taken off of the files, for reasons wholly and entirely insufficient.

Fifth. In entering a decree pro confesso without notice, when there was an answer on file.

Sixth. In entering a decree against the said John H. Herndon, when upon the face of the bill it clearly appeared that the complainant was entitled to no relief whatever, because, by the case made by the bill, the complainant relied upon a void title, and the bill also stated a case where the remedy, if there were any, was clearly at law.

Seventh. Because, upon the report of the master, it appears
103 that no notice had been given to the defendant John H. Herndon, and the facts reported did not authorize the decree.

Eighth. In that the case was never set for, or lawfully brought to, a hearing; in that the court did not dismiss the bill for want of equity, and for want of proof of any title whatever.

Tenth. In ordering a decree against defendant for costs, and ordering execution therefor.

Eleventh. In not doing full and complete justice to your petitioner, as in said proceeding will appear.

Twelfth. In rendering a decree, without any action, against a great

number of his co-defendants; yet it was ordered and adjudged that your petitioner and the defendant Maverick should pay all the costs.

Your petitioner says that his co-defendant Maverick refuses to prosecute this appeal with him, and as to the co-defendants McMullens, the proceedings show that it was a made-up case as to them, and the record, in many things, shows fraud upon the jurisdiction of the court.

And now your petitioner prays an appeal against the said complainants hereinbefore named, to the Supreme Court of the United States at its next term at Washington.

GEO. W. PASCHAL,
Solicitor for Petitioner.

104 *Appeal granted.*

AT CHAMBERS, *Austin, July 23d*, 1868.

The appeal, as prayed for in the foregoing petition, is hereby allowed. The petitioner will give bond in three hundred dollars.

NOTE.—The property in controvery is in value more than two thousand dollars.

T. H. DUVAL, *U. S. Dist. Judge,*
Act'g as Circuit Court Judge.

Filed Sept. 4, 1868.

M. HOPKINS, *Clerk.*

Appeal bond.

UNITED STATES OF AMERICA, *District of Texas:*

Know all men by these presents that we, John H. Herndon, as principal, and Sam. Harris and Rhodes Fisher, of Travis County as sureties, are held and firmly bound to Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, Ephraim H. Lombard, Julia A. Lombard, and Mehitabel Howard in the sum of three hundred dollars, to be paid to the said obligees, their certain attorney, executors, and administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately, at a term of the circuit court of the United
105 States for the western district of Texas, at Austin, in a cause pending in said court, wherein the said obligees hereinbefore named were complainants, and the said John H. Herndon and others (named in the bill and petition for appeal) were defendants, numbered ten upon the chancery docket of said court, a decree was rendered against the said John H. Herndon, in favor of the said obligees, (complainants,) from which decree the said John H. Herndon has obtained an appeal to reverse the aforesaid cause, and also a citation directed to the said obligees, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday in December, A. D. 1868:

Now, the condition of the above obligation is such, that if the said John H. Herndon shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JNO. H. HERNDON. [L. S.]
SAM'L HARRIS. [L. S.]
RHOADS FISHER. [L. S.]

Approved:

T. H. DUVAL, *U. S. Judge.*

Filed, Sept. 4, 1868.

M. HOPKINS, *Clerk.*

Bond for costs.

UNITED STATES OF AMERICA, *District of Texas:*

106 Know all men by these presents that we, John H. Herndon, of Brazoria County, in the State of Texas, and Sam'l Harris & Rhoads Fisher, of Travis County, in the State of Texas, are held and firmly bound unto D. W. Middleton, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-third day of July, in the year of our Lord one thousand eight hundred and sixty eight.

Whereas at Austin, in a suit depending in the circuit court of the United States for the western district of Texas, between Volney E. Howard, Richard A. Howard, Thomas H. Bennett, Caroline H. Bennett, Ephraim H. Lombard, Julia A. Lombard, Russell Howard, and Mehitabel Howard, complainants, and Archibald Hodge, George W. Price, R. C. Garza, W. E. Howth, John H. Herndon, Samuel A. Maverick, James P. Hudson, Samuel Luckie, Willard Richardson, Samuel S. Smith, and James A. Mason, in the original bill, (and R. C. Garza, Samuel Luckie, and James P. Hudson having died,) the bill was revived, or attempted

107 to be revived, against Antonio Seiria, husband of Maria Antonia Veremendi y Seiria, widow of R. C. Garza, dec'd, Juan Garza, and Adolfo Garza, heirs of R. C. Garza, dec'd, and William F. Luckie, defendants, a decree was rendered against the said John H. Herndon, and the said John H. Herndon having obtained an order to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such, that if the said obligors shall well and truly pay, or cause to be paid, to the said D. W. Middleton, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said D. W. Middleton, clerk as aforesaid, and charged to the said John H. Herndon, in the prosecution of the said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

JNO. H. HERNDON. [L. S.]
SAM'L HARRIS. [L. S.]
RHOADS FISHER. [L. S.]

Approved:

T. H. DUVLL, *U. S. Judge.*

Filed, Sept. 4, 1868.

M. HOPKINS, *Clerk.*

Citation on appeal.

UNITED STATES OF AMERICA:

JOHN H. HERNDON, APPELLANT,
vs.
HEIRS OF BAINBRIDGE D. HOWARD, TO WIT:
Volney E. Howard, Richard A. Howard,
108 Russell Howard, Thomas H. Bennett &
Caroline H., (formerly Howard,) his wife,
Ephraim H. Lambard & Julia A., (formerly
Howard,) his wife, and Mehitable Howard,
heirs at law and appellees.
} Citation on appeal.

The President of the United States to Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett and Caroline H., (formerly Howard,) his wife, Ephraim H. Lombard and Julia A., (formerly Howard,) his wife, and Mehitable Howard, heirs at law of Bainbridge D. Howard, deceased; and William Alexander, of Austin, Texas; Volney E. Howard, of California; and Russell Howard, of San Antonio, Texas, their solicitors:

You are hereby cited and admonished to appear at the next term of the Supreme Court of the United States, to be held at Washington on the first Monday of December next, to show cause, if any there be, why the decree rendered in your favor by the circuit court of the United States for the western district of Texas, in a certain suit or cause therein formerly depending between you as complainants and John H. Herndon, Samuel Maverick, and others, who were defendants, numbered (10) upon the chancery docket of said court at Austin, should not be reversed, and speedy justice be done to the parties in that behalf, in pursuance of an appeal obtained by the said John H. Herndon, according to his petition filed in the circuit court of the United States for the western district of Texas, at Austin.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at
109 Austin, this 12th day of November, A. D. 1868.

[L. S.] MATTHEW HOPKINS, *Clerk.*

Marshal's return.

Rec'd in office Nov. 12, '68, & executed by handing Russell Howard a true copy of this writ, certified by the clerk, under the seal of the court, on the 16th day of November, 1868.

A. P. BLOCKER, *U. S. M.*,
By F. L. PASCHAL, *Dep'y.*

And by handing Wm. Alexander a copy of the same, attested by the clerk, under the seal of the court, on the 14th November, 1868.

A. P. BLOCKER, *U. S. M.*,
By H. A. HARALSON, *Deputy.*

Mar. mil. on writ, 80 miles, 6 c..... $4 80
Service 2 copies writs, $2 00 ea..... 4 00

UNITED STATES OF AMERICA, *Western District of Texas:*

I, Matthew Hopkins, clerk of the circuit court of the United States for

the western district of Texas, at Austin, certify the foregoing, contained on this page, and 108 pages hereto attached, to be a full, complete, and correct transcript of the record of a cause lately depending in said court, in which the heirs of Bainbridge D. Howard, dec'd, were complainants, and Archibald Hodge & als. were defendants.

Witness my hand and the seal of said court, at office in Austin, this 13 day of January, A. D. 1869.

[SEAL.] MATTHEW HOPKINS, *Clerk.*

(Indorsement on cover:) No. 251. John H. Herndon, appellant, vs. Volney E. Howard, Richard A. Howard, Russell Howard, Thomas H. Bennett, Caroline H. Bennett, E. H. Lombard, Julia A. Lombard, and Mehitabel Howard. W. Texas C. C. U. S.

Filed 10th September, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1869.

BRANCH T. MASTERSON, Assignee in Bankruptcy of JOHN H. HERNDON, Appellant, *vs.* VOLNEY E. HOWARD *et al.*, Appellees.	No. 251.

APPELLANT'S BRIEF.

The original bill in this case is in the name of Bainbridge D. Howard, filed February 17, 1851, against John Herndon, the present appellant, and ten other defendants.

The bill charged that in 1766 the King of Spain granted to the Indians of the mission of San José a tract of land situate in the present county of Medina, in the State of Texas, and that said grant vested an indefeasible estate in fee in said Indians.

That by conveyances from said Indians "to those or him under whom complainant claimed and to the complainant, all the title of the Indians became vested in the complainant, and he thereby became possessed of the same in fee."

That the defendants have jointly or separately made locations on parts of said tract of land, under patents from the State of Texas; that said locations are a cloud on complainant's title; that his title cannot be quieted and the cloud over it removed without a multiplicity of suits.

Bill prays a discovery from defendants, and that defendants' locations may be declared void and cloud over complainants' title removed, and for general relief.

The complainant, Bainbridge D. Howard, died in December, 1851. (Transcript, p. 11.)

Bill of reviver filed in the name of the heirs of Bainbridge D. Howard, January 29, 1860. (Transcript, p. 13.)

Supplemental bill filed June 29, 1860.

Order *pro confesso* against Herndon and all the defendants who had been served, September 5, 1859. (Transcript, p. 20.)

Order *pro confesso* set aside as to Herndon on terms. (Transcript, p. 21.)

Order at rules taking bill *pro confesso* against Herndon, October 1, 1860.

Order *pro confesso* against Herndon set aside on terms of his paying one-half of all the costs against him. (Transcript, p. 20.

Answer of McMullen's heirs. (Transcript, p. 28.)

Answer of Herndon. Filed March 4, 1861. (Transcript, p. 30.)

Herndon's answer struck from the files, for non-compliance with the order setting aside the judgment of *pro confesso* against him and permitting him to answer. June 20, 1866. (Transcript, p. 35.)

Decree establishing complainant's rights and ordering reference to master. June 20, 1866. (Transcript, p. 35.)

Master's report. (Transcript, p. 36.)

Master's supplemental report. (Transcript, p. 40.)

Under this state of pleadings and facts the defendant, Herndon, brings the present appeal.

It is important to be noted on the threshold of the case here that the party from whom Bainbridge D. Howard derived his title was one John McMullen, a citizen of Texas, and that John McMullen had, previous to his alleged transfer of title to Howard, sued the defendants named in the original bill at law in the district court of the county of Bexar, Texas, to recover the land, the subject of the present controversy, in which suit judgment had been rendered in favor of the defendants, and upon appeal to the supreme court of Texas the judgment below was affirmed, the supreme court holding:

"That the grant relied on by him (McMullen) as the foundation of title only admitted the Indians of the Mission of San José to composition, and that it constituted them *tenants-at-will* of the Government.

"That, by the laws in force at the date of the grant, the Indians could not alienate their possessions *without the consent of the Government.*

"That, *having seen no evidence* of *any authority or consent to such sale, it is void, and gives no title to the purchaser.*

"That the *lands sued for became, by the extinction of the Mission of San José, a part of the public domain.*"

McMullen *vs.* Hodge *et al.*, 5 Texas Reports, (for 1849,) pp. 34, 87.

The case was argued before the supreme court of Texas most elaborately, by one of the present defendants in error, Volney E. Howard, who was then the counsel for McMullen.

As the decree appealed from was rendered without evidence, on the alleged default of the defendant to file an answer, it is proper to consider the effect of such a decree.

The 18th rule of practice for the courts of the United States (Rules of the Supreme Court and for the district and circuit court in equity and admiralty, p. 36) determines this point.

This rule provides, that in default of the defendant to answer within the proper time, the plaintiff may enter an order that the bill be taken *pro confesso*, "and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof, accordingly, if the same can be done without an answer, and is *proper to be decreed.*"

The failure of defendant to answer, and thus letting a decree *pro confesso* go against him, is to admit all the facts in the bill that are well pleaded. He is in the same condition, so far as the admission of the facts stated in the bill is concerned, as if he had demurred generally.

Where bill has been taken *pro confesso*, the defendant may take advantage of any matter which would be good cause of demurrer.

Wilson *vs.* Waterman, 6 Richardson's S. C. E. R., 255.

If the charge in a bill be not stated with sufficient certainty, the plaintiff cannot, even after a decree *pro confesso*, have a final decree, unless he establish his demand by satisfactory evidence.

Pegg *vs.* Davis, 2 Blackf., 281.

In an anonymous case, (4 Hen. & Munf., 476,) it was held that on a bill taken *pro confesso* a plaintiff cannot obtain a decree without filing his documentary evidence.

If the bill does not contain the requisite allegations, it will not entitle the plaintiff to relief, though taken *pro confesso*.

8 B. Munroe, 135.

In this case the fact that a grant was made to the Indians of San José is admitted by the failure to answer, but the construction put on the grant by complainant is not admitted, because the construction of the grant is a question of law for the court.

The construction of all written instruments belongs to the court alone.

Broom's Legal Maxims, sec. 44.

Worthington's Power of Juries, p. 57, Law Library, 4th series, 3 vol.

The *factum* of the grant to the Indians was admitted by the default of defendant, but its construction and legal effect were referred to the judge as matter of law.

A deed alleged in pleading must be shown to the court.

Tomlin's Law Dictionary, tit. Deed, p. 526.

Here we call attention to certain irregularities and illegalities in this extraordinary case.

a. The grant to the Indians is not set out or proved, nor does it appear ever to have been seen by the judge.

b. The original bill alleges a complete legal title in Bainbridge Howard; the supplemental bill alleges only an equitable title in him.

c. The bill of revivor does not name the widow of Bain-

bridge Howard as one of his heirs, and she is so named in the supplemental bill, and not named in the decretal order of June 20, 1866.

2 Daniel's Chancery Practice, sec. 1211, (Boston edition, 1851.)

d. The bill is taken *pro confesso* as to infants without appointment of guardians *ad litem* or proofs.

Massie *vs.* Donaldson, 8 Ohio, 357.

Mills *vs.* Dennis, 3 Johns. Ch. R., 367.

e. The order of revivor and for leave to file a supplemental bill does not include the names of Richard A. Howard, Russell Howard, and Amelia F., the widow of Bainbridge D. Howard, and the supplemental bill does include these persons as complainants, who are also included in the decretal order of June 20, 1866, except Amelia J., the widow, whose name is left out in said decretal order.

Seaton on Decrees, p. 4.

f. Supplemental bill states facts known when the original bill was filed, and so demurrable.

Mitford's E. P., sec. 202, 262.

Baldwin *vs.* Mackown, 3 Atkyn's R., 817.

g. The names of the heirs of McMullen not set out in the supplemental bill.

h. The original bill set up a legal title in Bainbridge D. Howard; the supplemental bill set up an equitable title in said Bainbridge D. Howard, which could only have been done by an original bill.

Story's Equity Pleadings, § 339, 275.

i. March 4, 1861, Herndon's answer was filed. Motion was submitted on the same day to strike it from the files. This motion was granted June 20, 1866, without notice to Herndon.

j. The original order *pro confesso* against Herndon was

set aside, on condition of his paying half of all the costs then incurred in the case against him.

k. The bill of revivor states that Richard A. Howard and Russell Howard, two of the complainants, are citizens of the State of Texas, thus stating a fact which ousted the jurisdiction of the court.

l. The master of the court proceeded under the decretal order of June 20, 1866, to make his report, without taking proper legal testimony, and without notice to Herndon. (Transcript, p. 37.)

m. The paper purporting to be the answer of the heirs of McMullen is not under oath.

n. The supplemental bill is multifarious, as introducing the heirs of McMullin as defendants.

West *vs.* Randall, 2 Mass. R., 181.
Atwell *vs.* Ferrett, 2 Blatchford R. C. C. R., 40.
Story's Equity Pleadings, pp. 225, 227.

The original grant to the Indians of San José, through which the defendants in error claim, is as follows:

"In consideration of the forgoing acts, I do hereby order, that the mandate of their Lordships of the Royal Audiencia, and in conformity that the sum of $150 be made into the royal treasury, *sin media annata*, on account of their being Indians of the population of San José, to whom the sale of eleven leagues of land is proved, and the same be granted to them by way of sale for their labors, pastures, and other purposes, *without the right of alienating, conceding, or selling any part thereof, without the supreme license of the Supreme Government of the Kingdom*, under penalty of *annulling this sale*, without prejudice to his Majesty or a third party." Dated November 11, 1766.

(*See* grant cited in McMullen *vs.* Hodge, 5 Tex., R. p. 79.

Under this state of facts and pleadings we submit the decree below should be reversed, for the following reasons:

1. Because of the irregularities and illegalities hereinbefore mentioned.

Tourniquet *vs.* Perkins, 16 Howard, 82.

Where a case is before the court on final hearing all previous interlocutory orders are open for revision.

Tourniquet *vs.* Perkins, 16 Howard, 82.

2. Because Bainbridge Howard was the assignee of a chose in action, not having a legal title to land, but only a contract for title from McMullen, who was a citizen of Texas.

Where the mortgagor and mortgagee resided in the same State, and the mortgagee assigned the mortgage to the citizen of another State, this assignee could not file his bill for foreclosure in the circuit court of the United States.

Sheldon *vs.* Sill, 8 Howard's R., 441.

3. Because the assignment or transfer of title from McMullen to Howard was evidently in fraud of the jurisdiction of the court and champertous, and the bill should have been dismissed on those grounds.

A deed executed for the purpose of giving jurisdiction will not be countenanced so as to sustain the jurisdiction.

Hurst *vs.* McNeil, 1 Wash. C. C. R., 70.

Maxfield's Lessee *vs.* Levy, 2 Dallas, 381.

Boyce U. S. Courts, 35.

As to champerty—

1 Story's Equity, § 294.

Sweet *vs.* Poor, 11 Mass. R., 533.

An answer not used in the cause may be read for some purposes.

Howell *vs.* George, 1 Mad. R., 13.

4. Because several of the complainants in the supplemental bill were citizens of Texas, and as such ousted the jurisdiction of the court.

If there be two or more joint plaintiffs and two or more joint defendants, where the interest is joint, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to give jurisdiction.

Strawbridge *et al. vs.* Curtiss *et al.*, 3 Cranch, 267.

All the parties on each side must be subject to the jurisdiction.

New Orleans *vs.* Winter *et al.*, Wheat., 91.

Jurisdiction would be ousted by joining parties as complainants who are citizens of the State where the bill is filed.

Wisner *vs.* Barnet, 4 W. C. C., 632.

5. Because the default of the defendant in not answering did not authorize a decree, inasmuch as the statements of the original and supplemental bill were inconsistent with each other in regard to the title of Bainbridge D. Howard. The original bill alleged he had acquired the legal title, and the supplemental bill an equitable title.

6. Because, admitting the facts stated in the original and supplemental bills to be true, the decree was erroneous. The most the court could have done was to have ordered an issue at law to try the title. Until the question of title was certainly ascertained, court could not render any such decree as it did.

Only one who has a clear legal and equitable title, accompanied with possession, can file a bill of peace.

Orton *vs.* Smith, 18 Howard, p. 263.

The courts of the United States will not entertain a bill of peace on a title in litigation in a State court.

Ib., 263.

See further, Shapley *vs.* Rangsley, 1 Woodbury & Minot's R., p. 213.

Craft *vs.* Lathrop, 2 Wallace, jr., C. C. R., 103.

Harmon *vs.* Gwyne, 3 McLean's R., 313.

Parker *vs.* Brant, 1 Fish, 58.

In ejectment after right established at law, equity will grant perpetual injunction. However, courts of equity will not interfere in such cases *before a trial at law.*

2 Story's Equity, § 859.

As to confusion of boundaries, Judge Story says: Where parties claim by adverse titles, without any superinduced equity, remedy is at law.

1 Story's Equity, § 620.

1 Story's Equity, pp. 149, (note,) 152, 153.

A bill of peace, enjoining litigation at law, seems to have been allowed only in one or two cases, either where the plaintiff has already satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render an issue under the direction of this court indispensable to embrace all the parties concerned, and to save multiplicity of suits.

Eldridge *vs.* Hill, 2 Johns. C. R., p. 282.

See Gibbes *vs.* Elliott, 6 Richardson's Equity R., (South Carolina,) p. 327.

Where the remedy at law is plain, adequate, and complete, the party seeking redress must pursue it. In such cases, the adverse party has a constitutional right to a trial by jury. The objection is jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings or by counsel.

Morgan *vs.* Bloit City, 7 Wallace, p. 618.

A bill of peace is that which lies in cases where a person has a right, which may be the subject of litigation with various persons. The court, to prevent multiplicity of suits, will direct the parties to try the validity of the title at law, and if the issue be favorable to the plaintiff, an injunction will be granted.

Goldsmith's Equity, p. 38, (Law Library.)

Baker *vs.* Shelbury, 1 Chancery Cases, p. 70.

Lord Tenham *vs.* Herbert, 2 Atk., p. 483.

Hanson *vs.* Gardiner, 7 Vesey, 310.

Lord Rederdale says, on this point: In most cases the plaintiff ought to establish his right at law before filing his bill in equity. And if he has not done so, and the right he

claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold.

Mitford's Equity Pleadings, p. 202, (§ 146.)
2 Story's Equity Pleadings, p. 149, (§ 854.)
See further, Welby *vs.* Duke of Rutland, 2 Brown P. C., 39.
Harris *vs.* Smith, 2 Dana, 11.
Bowen *vs.* Idley, 6 Paige's C. R., 46.
Pemberton *vs.* Pemberton, 13 Vesey, 297.
Piersoll *vs.* Elliott, 6 Peter's R., 100.
Stuart's Heirs *vs.* Coalter, 4 Randolph's (Virginia) R., 75.
Jones *vs.* Jones, 3 Merrivale's R., 161.
Colton *vs.* Ross, 2 Paige, 396.
Mange *vs.* Generat, 6 Wharton's Penn. R.
Armitage *vs.* Wadsworth, 1 Maddock C. R., 192.
Crow *et al. vs.* Syrrel, 3 Maddock C., 179.
Abbott *vs.* Allen, 2 John C. R., 519.
Lowndes *vs.* Bettle, 4 American Law Register, pp. 169, 173.
2 Story's Equity, §§ 750, 734, 650, (Note.)
Power *vs.* Knowler, 2 Atk., 224.
1 Story's Equity, 89, 90.
2 Story's Equity, pp. 151, 152, 153.
Leighton *vs.* Leighton, 1 Peere Williams, p. 672.
Story's Equity Pleadings, p. 374.
Loker *vs.* Rolle, 3 Vesey, 3.
Rynes *vs.* Rynes, 3 Vesey, 346.

7. Because the default of Herndon only admitted the *factum* of the grant to the San José Indians, referring to the court the construction of the grant: that the court erred in supposing that this grant gave the Indians a fee-simple title.

8. Because the supreme court of Texas having decided that the grant relied on in this case only made the San José Indians tenants at will, incapable of aliening the fee; this was the law of the case, which the court below was bound to know judicially and to conform to.

The federal courts adopt the decisions of the highest State courts as the local law of real property.

St. John *vs.* Cheed, 12 Wheat. R., 158.
Bell *vs.* Morrison, 1 Pet., 352.
Bank of Hamilton *vs.* Dudley, 2 Pet., 492.
Henderson *vs.* Griffin, 5 Pet., 151.
See further, 6 Pet., 283, 291; 7 Pet., 542, 609; 8 Pet., 220; 15 How., 425; 18 How., 497; 24 How., 427; 2 Black, 532.
Concklin's United States Courts, 144.

W. W. Boyce,
Counsel for Appellant.

16 Hon.

v. Conrad

In the Supreme Court of the U. S.

JOHN H. HERNDON
v.
VOLNEY E. HOWARD, ET AL. } No. 251.

The Bill was filed on the 17 Feb'y, 1851, by Bainbridge D. Howard, a citizen of Louisiana against certain defendants, citizens of Texas, and James A. Mason, a citizen of Pennsylvania. It asserts title to a tract of land which was conveyed by the Spanish Government in 1766, to the Indians of the Mission of San José, which by a regular deraingment of title was vested in the complainant, and that the possession of said land had followed and accompanied said conveyances.

It asserts, that the defendants by virtue of pretended titles, have disturbed, and are disturbing the possession and seizin of the complainant, though they well knew that their pretended titles are void; that this assertion on the part of the defendants is a cloud upon the title of complainant, and that he cannot be quieted at law without a multiplicity of suits, and harrassing and vexatious litigagation.

The Bill prays that the titles of the defendants may be held to be void, and the cloud upon the complainant's right may be removed; or, that after the establishment of his right in such manner as the court may decree, he may be quieted in his title and possession, and for general relief.

The appellant was served on 17 March with subpœna to answer on the 1st Monday in April following.

The death of Bainbridge Howard being suggested, leave to file a Bill of Revivor was given, and the Bill was filed in the name of his heirs, the present appellees, on 29 January, 1859.

The appellant was served with subpœna on 9 May, 1859, to appear and answer on the first Monday June next. p. 16.

A rule taking a Decree pro confesso against the appellant and others, was entered on 5 September, 1859. p. 20.

On 25 June, 1860, an agreement was entered of Record, that this Decree pro confesso should be set aside upon the *condition*, that Herndon the appellant, *should pay one-half of the costs* of the complainant; that the complainants have leave before the next rule day to file a supplemental Bill in the nature of a Bill of Revivor, and that the parties were to appear without further process, and to have until the *third rule day after filing the Supplemental Bill* to answer the same. The agreement to be entered as an order in the cause. p. 20.

On same day, the chancellor entered an order, by virtue of this agreement, that the Decree entered on the 5 September, 1859, taking the Bill pro confesso, be set aside, the defendant, Herndon, to pay one-half of the costs of complainants to date, and that the parties to the agreement should appear to the Supplemental Bill without further process, within the period of the third rule day subsequent to the filing thereof. p. 21.

On 29 June, 1860, the complainants, in open court, and by leave of the judge, filed his Supplemental Bill, as stipulated in the agreement. p. 22.

In this Bill the title to the land in question is stated thus:—the grant to the Mission of San José was made to John McMullen, who thus held the title and possession until the 5 November, 1849, when, for a valuable consideration, he conveyed the same to Bainbridge Howard—but

through mistake, this instrument of conveyance was not sealed, nor was it witnessed by two witnesses.

That Bainbridge Howard, was thus vested with the equitable title and departed his life without discovering the mistake.

The Bill avers that Herndon, the appellant, and Samuel A. Maverick are the only two of the original defendants as to whom the original Bill has not been abated by death or else stands taken pro confesso, and that they have cast a cloud upon complainants' title, and have endeavored to subject them to vexatious litigations, and a multiplicity of suits, as is therein specifically set forth.

On the 1 October, 1860, the Bill is taken as confessed at rules against Maverick and Herndon, they having failed to answer as directed by the order made at the June Term, 1860. p. 26.

On the 5 November, 1860, a motion was entered on the rule book, that the court on reaching the cause on the docket at the next term would enter a decree as taken pro confesso.

On the 11 January, 1861, Herndon entered on the rule book a motion to set aside the Decree pro confesso, for certain reasons therein specified. p. 27.

The heirs of John McMullen having filed an answer admitting all the allegations of the bill, a Decree was entered against all the defendants, except Herndon, the appellant. As to him the pro confesso was again set aside, and time given to file his answer until the rule day in March, *upon condition* that he pay all the costs of the complainant in this cause for which execution may issue. p. 29.

Herndon filed his answer at rules on 4 March, 1861. p. 30.

On same day complainants entered a motion to strike this answer from the files as having been improvidently marked filed, on the ground, that Herndon was in con-

tempt of the Court in not having paid the costs decreed against him. p. 34.

On 20 June, 1866, the Court entered a Decree striking the answer from the files Herndon, being in contempt, as set forth in the motion, and it was further ordered that the order at rules on the 4 March, 1861, taking the supplemental Bill and other pleadings of complainants for confessed be confirmed, and made final as to said defendant John H. Herndon. p. 35.

In a supplemental Report made by the master on 7 January, 1867, it is stated that in the Month of April, 1861, the defendant Herndon paid in all $56.73, for which he is credited but that this payment *did not amount to a compliance with the order of this Court*, and that the defendant Maverick has paid no part of the costs. p. 41.

A first and second execution for the costs having been returned unsatisfied, a third execution was issued on 3 June, 1867, against Herndon and Maverick, with bill of costs attached. p. 43.

Upon this execution Maverick paid one-half, say $291 45.

Herndon petitioned for an appeal which, was granted at chambers on the 23 July, 1868. pp. 46–7

The imposition of costs as a condition for setting aside the second Decree pro confesso is a matter purely within the discretion of the Court below, and is consequently not the subject of revision here.

If this be so, then the answer filed without complying with the condition, was properly stricken from the files, and the Decree pro confesso properly entered.

Dean v. Mason, 20 How. 198.

Many objections are made by the appellant as to the regularity of the proceedings in the Court below, but it is

evident that admitting his right to be heard at all as he alone has appealed, he must be limited to those matters which *concern him and affect his interest.*

It is said that the Court below was ousted of jurisdiction by the citizenship of the parties introduced in the Bill of Revivor and supplement.

The original complainant Bainbridge B. Howard, sued as a citizen of Louisiana, and the Court was legally possessed of jurisdiction; on his death the Billwas revived in the names of his heirs. But the Court was not divested of its jurisdiction by reason of the citizenship which would have disabled the same parties from maintaining an *original bill.*

Clark v. Matthowson, 12 Pet. 164.
Minnesota v. St. Paul, 2 Wall. 631.

Again it is objected that there was no jurisdiction because the remedy was at law.

No objection to the jurisdiction was taken in the Court below.

"The want of jurisdiction if relied on by defendant should have been alleged by plea or answer. It is too late to raise such an objection in the appellate Court unless the want of jurisdiction *is apparent on the face of the Bill.*"

Wylie v. Cox, 15 How., 420.
Underhill v. Van Courtland, 2 John Chan. 369.
1 Daniels Ch. Prac. 615.

To defeat the jurisdiction it is not enough to say there is a remedy at law but it must be shown to be *plain, adequate* and *complete.*

Storys' Eq. Plead, § 473.

It is again urged that the chancellor had no authority to enter the Decree before directing an issue at law to try the title.

The rule is this. Courts of Equity interpose to prevent

multiplicity of suits, for as each separate party may sue, or be sued, in a separate action at law, and each suit would only decide the particular right between the plaintiff and defendant in that action, litigation might become interminable. Courts of Equity, having the power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and if it be *necessary* they will ascertain it, by an action at law, and then make a final Decree binding upon all the parties.

2 Storys' Eq. § 854.

Here it was *not necessary*. The title of the complainant was clearly set forth, and this was *confessed* by the failure to answer.

It is urged, that as the original Bill set up a *legal title* in Bainbridge Howard, a supplemental Bill could not put in issue an *equitable title*. That this could only be done by original Bill and for this we are referred to Storys' Eq. Plead § 339.

It is true that ne title cannot be asserted in the original, and a *distinct* title in a supplemental Bill:—as if one should claim as *heir at law*, and then by supplement, claim as *purchaser* of the estate. But here it is the *same title*. The conveyance of the land had been made, but by accident the seal had been omitted. This was all the new matter stated in the supplement.

It is objected that though a Decree pro confesso had been entered, the chancellor was not authorized to enter a final Decree *without proofs*.

One answer is that the Bill offers to produce the evidences of the title on the hearing, and the presumption is that they were produced.

But Bills are now taken pro confesso in our practice without obliging the plaintiff to pursue the defendant on to process of sequestration.

The Court has adopted the method of rendering its pro-

cess effectual, by treating the defendants' contumacy as an *admission of the plaintiff's case;* and it decrees against the defendant, according to the *equity arising upon the case as stated by the plaintiff;* and this proceeding is called taking a Bill pro confesso.

1 Daniel, Ch. Pr. 369.

Wherever therfore the case of the plaintiff is *clearly* stated a final decree may be made after a pro confesso *without any proof.*

The appellant relies upon the case of Pegg v. Davis, but it directly sustains our proposition.

The case was this. In a Bill filed on a money demand, the first statement of the Bill was, that defendant was indebted "for cash notes. to a large amount SAY $2000." The second statement was "for a large sum of money." It was held erroneous to enter a Decree on this Bill without proofs—But the Court at the same time said that if the charge of the indebtedness had been *explicit*, the Decree would have been good.

2 Blackf. 285.

It is again objected that while the order for a revivor, and leave to file a supplemental Bill does not include the names of Richard A. Howard, Russell Howard and Amelia F., the widow of Bainbridge Howard, yet that the supplemental Bill does include these persons as complainants.

But this is a mistake of fact: the supplemental Bill only names them in stating that they had conveyed all their interest in the premises to Volney Howard, one of the complainants. p. 22.

Finally it is said that in a case to be found in the Texas Reports, McMullens, title has been held to be invalid, and that the Circuit Court "was bound to know this judicially, and to conform to it" and therefore the Decree must be reversed.

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cess effectual, by treating the defendants' contumacy as an *admission of the plaintiff's case;* and it decrees against the defendant, according to the *equity arising upon the case as stated by the plaintiff;* and this proceeding is called taking a Bill pro confesso.

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But this is a mistake of fact: the supplemental Bill only names them in stating that they had conveyed all their interest in the premises to Volney Howard, one of the complainants. p. 22.

Finally it is said that in a case to be found in the Texas Reports, McMullens, title has been held to be invalid, and that the Circuit Court "was bound to know this judicially, and to conform to it" and therefore the Decree must be reversed.

Now as the case of McMullen was not between the same parties, a formal plea of *res adjudicata*, could not not have been maintained: and it is difficult to understand how the Decree can be reversed in the absence of any plea or answer, and in a proceeding where the Complainant's title stands confessed.

The decision in the case referred to, held that "having *seen no evidence of any authority or consent* on the part of the Government to the sale of the Indian title, the sale was void.

The case was argued on the part of McMullen by Mr. Volney E. Howard, who is the chief complainant in the Bill filed two years after this decision, and it is not to be supposed that he would renew a litigation under this title, without being prepared to supply the omission that constituted the ground of the adverse decision.

We therefore find in the bill filed by him the averment "that by the laws in force at the time of the original grant to the Indians and subsequently thereto, operating on said grant, and the contract indicated there by, *an indefeasible estate in fee* was vested in said Indians and in those claiming and deraining title through them down to and including said John McMullen deceased: and that a valid equitable title to said tract was made by said McMullen to said Bainbridge D. Howard, deceased, which is now vested in your orators as his heirs at law; all of which will appear more fully by the grant to said Indians with the chain of conveyances, to which for greater certainty at the hearing hereof, your orators crave leave to refer." p. 23.

Assuming these statements to be admitted as true, the Court was bound to Decree for complainants, though the decision in 5 Texas had been formally before it.

We do not deem it necessary to raise the question whether a party in contempt can take an appeal, or

whether on a confession, he can be heard to assign such errors as are here pointed out.

If we are wrong in all the foregoing positions, there is still a point which is fatal to the present appeal.

The Decree of 20 June, 1866, from which we presume this appeal is intended to be taken, is, that the complainants have and recover of the said Samuel A. Maverick and John H. Herndon, the tract of land in the original Bill described."

This is a *joint decree* against the *two defendants*. Can Herndon alone take an appeal?

In the case of Williams v. Bk. U. S., 11 Wheat. 114; which was a *writ of error* sued out by one defendant to a joint judgment against three, the writ was dismissed.

In the case of Owens v. Kincanmon, which was an *appeal*, this court held, that as the act of 1803 subjected appeals "to the same rules, regulations and restrictions, as are prescribed by law in cases of writ of error," it followed that the *same parties* should prosecute the appeal as would be necessary in a of writ of error.

That this is not only the requirement of the statute, but follows also the general usage of Chancery to make one final Decree binding on all the parties.

7 Pet., 402.

Heirs of Wilson v. Ins. Co. 12 Pet. 140.

It is true that in the petition for appeal, which is signed by the *solicitor* of the petitioner, we have this statement: "Your petitioner *says*, that his co-defendant Maverick, refuses to prosecute this appeal with him."

But if this statement had even been verified by an oath, it would not suffice. A proceeding in which Maverick would be entitled to be heard as to this matter is necessary.

That proceeding is stated in the case of Todd et al. v. Daniel by Judge Story in delivering the opinion of this

Court, thus: Where there are several defendants affected by a joint decree, all should be joined in the Appeal; and if any refuse, or decline upon *notice and process* (in the nature of a *summons* and *severance* in a *writ of Error*) to be issued in the Court below, to become parties to the appeal, then the other defendants to be at liberty to prosecute the appeal for themselves; and the appeal as to the others be pronounced to be deserted, and the decree of the Court below as to them to be proceeded in, and executed.

16 Pet., 523.

The summons and severance essentially necessary being absent in this case, there is nothing to sustain the jurisdiction of the Court in the present appeal.

It may be well to call attention to the fact, that the petition craves an appeal from a Decree rendered "on the eighteenth day of June, 1867," while the final Decree was rendered on "the 20th June, 1866." P. 35.

P. PHILLIPS,
Of Counsel for Appellees.

November 25, 1870